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Summary of the

REPORT OF THE SELECT COMMITTEE ON WATER MARKETING

TO THE

49TH LEGISLATURE

STATE OF MONTANA

JANUARY 1985

Senator Jean Turnage, Chair

Representative John Shontz, Vice-Chair

Representative Dan Kemmis	Senator Chet Blaylock
Representative Dennis Iverson	Senator Dave Manning
Representative John Harp	Senator Jim Shaw

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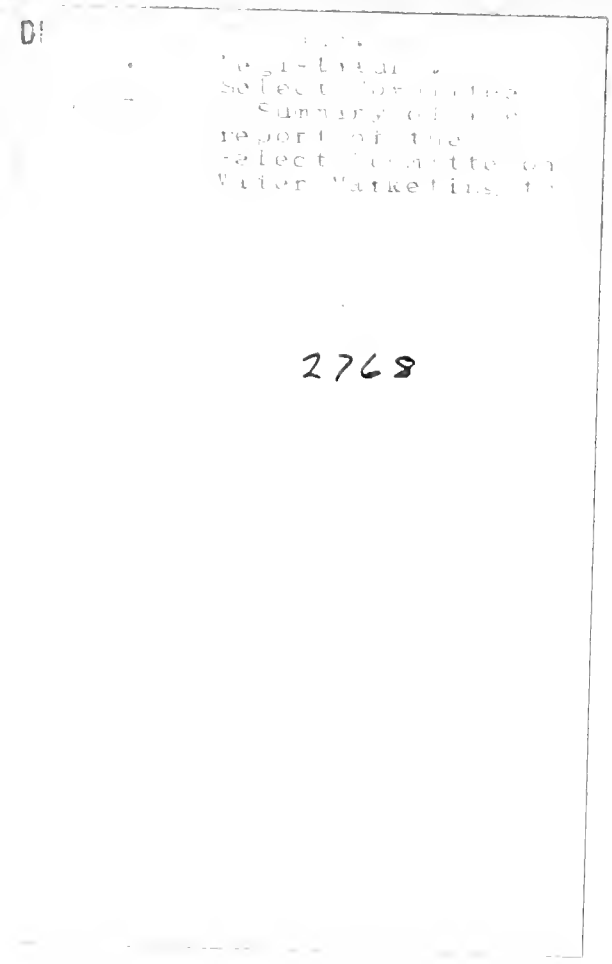

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The Big Sky Country

MONTANA STATE SENATE

January 1985

President of the Senate
Speaker of the House
Montana Legislature

Gentlemen:

No more important natural resource issue faced the 48th Legislature, which met January 3 to April 21, 1983, than the question of marketing Montana's waters. Based upon the work and recommendations of the Select Committee on Water Marketing, whose report I am honored to transmit, Montana's policies for the management, conservation, and use of its waters will be a vital issue facing the 49th and future Legislatures as well.

The 48th Legislature was highlighted by deliberations over whether Montana should market its waters - principally for industrial uses and particularly for coal slurry. There were some who urged us into immediate action based on their prediction that, if Montana did not act swiftly to market its surplus waters, two undesirable results would occur. First, downstream states would satisfy the demand and reap the financial rewards. Worse, in doing so, they would appropriate, put to use, and remove from Montana's eventual use those waters involved.

The 48th Legislature did act to suspend the constitutionally suspect ban against out-of-state exports of water (MCA § 85-1-121) and to allow limited water marketing from Fort Peck and other federal reservoirs. Its members, however, chose not to adopt a hastily conceived and insufficiently understood water marketing program. The Legislature's principal response, with the passage of House Bill 908, was to mandate a two-year study of water marketing by a Select Committee which it has been my privilege to chair.

Events have demonstrated the wisdom of this caution. Although interest in the water marketing concept continues to grow, there has not developed a regional water market. There has been no serious interest in the purchase of water from Fort Peck. In fact, the sale by South Dakota of 50,000 acre feet of water per year from Oahe Reservoir to the ETSI coal slurry pipeline conglomerate has fallen though.

This market hiatus has benefitted the committee's work. When initially proposed to the Legislature, the water marketing concept diverted attention away from the more important issue: what should be Montana's water policy in an interstate setting?

I am pleased to report that, in nine meetings of the Select Committee over the last 19 months, this broader inquiry has been addressed. We have received the insightful testimony of concerned Montana citizens and organizations. We have benefitted from the expertise of practitioners and scholars from Montana and other western states. We have been aided by the cooperative efforts of the departments of Natural Resources and Conservation and Fish, Wildlife, and Parks. The committee is particularly indebted to the Lincoln Institute of Land Policy, which cosponsored two excellent legal and policy seminars on interstate water issues.

The complete final report of the committee is being conveyed to the Legislature under separate cover, and I urge any person who is deeply interested in this topic to consult this very complete document. This summary report sets forth the actions that have been approved by and are being recommended by the committee. I am pleased to report that these recommendations were unanimously approved by all members of the committee in attendance at its meeting on December 3, 1984.

Many of these recommendations specify those actions that should be taken by the 49th Legislature. Other recommendations set forth an agenda of water issues that must be systematically addressed by the Legislature and the citizens of the state in the years to come. These recommendations concern a strategy for a water policy for Montana in an interstate setting. This agenda is too important and too complex to be addressed by one interim committee or one legislative session. These issues significantly affect the future of Montana. The deliberations around them must be ongoing.

In behalf of all members of the Select Committee, I urge your careful consideration of this report.

Sincerely,

SENATOR JEAN TURNAGE
Chairman

OVERVIEW OF THE COMMITTEE'S RECOMMENDATIONS

The following is an overview of the major recommendations of the Select Committee on Water Marketing to the 49th Legislature.

A. REGULATING THE INTERSTATE MOVEMENT OF WATER

1. Ban on the exportation of water. The statutory ban on the exportation of water from Montana (MCA § 85-1-121) should be permanently repealed; and, with appropriate safeguards, Montana's waters should be permitted to move interstate.

2. Permit criteria. Applications to appropriate large quantities of new water [4000 acre feet/year (ac-ft/yr) and 5.5 cubic feet/second (cfs)] or to change the use or location of presently appropriated water - especially when these applications contemplate the interstate movement of water - should be closely evaluated with reference to detailed public interest criteria (MCA § 85-2-311).

3. Water for coal slurry purposes. With safeguards appropriate to protect the state, its environment, and its citizens, Montana's ban on the use of water for coal slurry purposes (MCA § 85-2-104) should be repealed.

4. Coverage of pipelines under the Major Facility Siting Act. The committee recommends that the siting of all future pipelines exceeding 30 miles in length and 17 inches in diameter be covered by the provisions of the Major Facility Siting Act (MCA § 75-20-101 et seq.).

B. STATE WATER LEASING PROGRAM

5. Limited water leasing program. The committee recommends a limited state water leasing program involving 50,000 ac-ft of impounded water. A lease, for a period not to exceed 50 years (which can be renewed), would be required to obtain water in two instances: (a) for transport, in any amount, outside of specified water basins; or (b) for any beneficial water use where consumption would exceed 4000 ac-ft/yr and

5.5 cfs. Lease applications would be reviewed under the public interest criteria of MCA § 85-2-311 (as proposed) and, in most cases, through an environmental impact statement.

6. Acquisition of water. Water for the water leasing program would be obtained from (a) specified existing federal reservoirs (i.e., Fort Peck, Canyon Ferry, Tiber, Hungry Horse, Yellowtail); or (b) other existing or future reservoirs in adjudicated basins.

7. Use of water leasing proceeds. The committee identifies numerous possible uses of proceeds from the water leasing program.

C. MAXIMIZING MONTANA'S FAIR SHARE OF MISSOURI RIVER BASIN WATER "GETTING MONTANA'S HOUSE IN ORDER"

8. General stream adjudication. The committee urges an expeditious and accurate completion of the statewide water adjudication process. The committee recommends that the Legislature support any justified funding request from the water courts.

9. Indian and federal reserved water rights. The committee recommends support for legislation to extend the Reserved Water Rights Compact Commission for two years and the appropriation of adequate funds for the commission to complete its goals.

10. Water resources data management system. The committee recommends the establishment with the Department of Natural Resources and Conservation (DNRC) of a centralized water resources data management system making readily accessible to the state's policymakers necessary information on the state's water resources, existing and projected uses, and existing and projected demands.

11. Water reservation system. Additional funds should be appropriated to ensure adequate monitoring and perfection of the existing Yellowstone water reservations. Water reservations similar to those developed for the Yellowstone River Basin should be prepared for the Missouri River Basin and funds should be appropriated to provide the necessary technical and financial assistance to applicants. Any reservation application proposing out-of-state use of water should be evaluated with

reference to detailed public interest criteria. The DNRC should continue its public education program concerning the merits and procedures of the reservation process.

12. State water plan. The committee strongly urges DNRC to comply with the provisions of MCA § 85-1-203 which requires the preparation of a state water plan, its approval by the Board of Natural Resources and Conservation, and its submission to each general session of the Legislature.

13. Water development. The committee recommends continued funding and bonding for identifying, developing, and constructing water projects within the state. The DNRC, Montana's Washington, D. C. office, and the state's Congressional delegation should work actively for the authorization and funding of federal projects within the state.

14. Water policy committee. The committee recommends the creation of a permanent legislative water policy committee to advise the Legislature, in an ongoing way, on water policy and issues of importance to the state.

"RELATING TO OTHER STATES IN THE MISSOURI RIVER BASIN"

15. Preparation for negotiations and possible litigation. Montana should systematically prepare for negotiations and potential litigation with other Missouri River Basin states.

16. Efforts toward an interstate compact. Efforts toward negotiating a compact among the Missouri River Basin states should be a high priority of Montana. While DNRC should have lead responsibility in this effort, the Legislature's water policy committee should be active in and supportive of these efforts.

D. MISCELLANEOUS PROVISIONS

17. Miscellaneous provisions. The committee makes certain miscellaneous and technical recommendations.

BACKGROUND

The history and culture of Montana are integrally linked with its waters - principally the waters of the Missouri and its tributaries. Before Europeans found their way into these quarters, the native people of the region were spiritually and practically reliant on the river. The journey of Lewis and Clark up to Three Forks and beyond opened the west. The fur trade of the 1800s resulted in a series of settlements along the river. Steamboats operated up as far as Fort Benton providing the materials and goods for the settlement in this new terrain. The major dams on the Missouri's mainstem - Canyon Ferry, Hauser, Holter, Fort Peck - have provided hydropower for the electrification and industrialization of the region as well as water for the irrigation of arid soils.

In the last several decades, the wilderness, recreational, and aesthetic importance of the river has been emphasized. Montanans are also concerned with the quality of the river - its cleanliness, as well as the visual and biological impact of human activities in its proximity.

Because of our ability to dam, divert, pollute, and even sterilize these waters, we as citizens and policymakers have a special responsibility toward our lifeblood. Our stewardship is particularly important due to our location at the headwaters: what we do here with these waters will affect downstream states and users. It was in response to this special and serious responsibility that the 48th Legislature mandated the study of water marketing by an interim Select Committee with four representatives from each of the houses of the Legislature.

The issue of water marketing became prominent during the 1983 Legislature because of the confluence of three events occurring during the six months preceding the opening of the session on January 3, 1983. The first event was the decision of the United States Supreme Court in Sporhase v. Nebraska in July 1982, that water is an article of interstate commerce and that absolute state statutory bans against the

exportation of water are unconstitutional as violations of the dormant interstate commerce clause.

The second event, which occurred on September 16, 1982, was the announcement by the State of South Dakota and Energy Transportation Systems, Inc. (ETSI), that South Dakota, after several months of secret negotiations, had agreed to sell 50,000 acre feet of water per year (ac-ft/yr), from Oahe Reservoir on the Missouri for $1.4 billion. The water would be used as the transport medium in a coal slurry pipeline to be built from coal fields in the Powder River Basin near Gillette, Wyoming, with a terminus 1300 to 1800 miles south in Arkansas and possibly Louisana. And, while ETSI has ultimately been cancelled, an alarm was sounded in other states at the time: "Let's get ours before we lose our chance."

The third event was the release, also on September 16, 1982, by the Montana Department of Natural Resources and Conservation (DNRC) of its Water Protection Strategy for Montana: Missouri River Basin (the "Trelease report"). In 1981, the Legislature had directed the department to develop a strategy to protect Montana's options for future instate water use in the face of expanding water use by downstream states. Completed by renowned water expert Frank J. Trelease and Wright Water Engineers, Inc., the study set forth a six-part strategy which, somewhat unfairly, has been widely summaried as suggesting a water development, "use it or lose it," strategy for the state.

By the commencement of the 1983 Legislature, these three events converged. Montana needed to protect its waters, principally on the Missouri. State control over its waters had been significantly weakened by the holding in Sporhase, and its long-term effects were uncertain. South Dakota had turned the damage done by Sporhase to state water jurisdiction into a huge, potential financial bonanza. Other states were likely to follow, with uncertain effects on the allocation of Missouri River water. Montana needed to develop its water through projects such as improvement of the Tongue River Dam, but substantial funds were needed. Therefore, the conclusion seemed logical at the

time: sell water to produce revenues to fund the water development projects necessary to save Montana's water.

During the 1983 session, three bills were ultimately introduced concerning water marketing. Rep. Ted Neuman introduced HB 893 for the Schwinden administration. Rep. Bob Marks introduced HB 894 in a measure closely paralleling the administration's bill.

Ultimately, HB 893 made it to the House floor where, during a late-night session, it was defeated. In its place the Legislature adopted HB 908, authored by Rep. Hal Harper and others. As amended and finally passed, this bill accomplished two things. First, the measure authorized a temporary water marketing program by broadening the authority of DNRC to purchase or acquire water from any federal reservoir (not just Fort Peck, as under the then-existing law) for the purposes of "sale, rent, or distribution for industrial or other purposes." The state's ban on the export of water was repealed, and detailed public interest criteria for the issuance of permits (and retaining ultimate legislative approval of certain large diversions) were placed into law. These provisions will expire on June 30, 1985, and the pre-existing law will be "revived" unless the 49th Legislature acts.

The second accomplishment of HB 908 was the creation of a Select Committee on Water Marketing to "undertake a study of economic, tax, administrative, legal, social, and environmental advantages and disadvantages of water marketing." The committee has been staffed by the Environmental Quality Council. Over the course of the two-year study, the committee has met for eight official meetings, two seminars, and three public hearings.

In developing its final recommendations, the committee considered the merits of four sets of water strategies. These strategy sets were identified as "Level 1" through "Level 4 Responses" depending on the breadth of the actions proposed. The four strategy sets, or levels of response, were as follows:

Level 1 Response - Do nothing

Level 2 Response - Undertake a "minor tune-up" of existing statutes

Level 3 Response - Develop a water marketing program

Level 4 Response - Develop a state strategy to maximize Montana's fair share of Missouri River Basin water

The committee ultimately decided that a comprehensive state water strategy (Level 4 Response) be recommended to the Legislature. The committee reached the consensus that, while they are important considerations, neither coal slurry nor water marketing are the only issues to be addressed. Rather, the fundamental concern of the 49th Legislature, as well as of many future legislature sessions, is the adequacy of state policies to maximize and reserve for present and future use Montana's fair share of the water in interstate rivers and streams - particularly the Missouri. We do not sell our heritage by marketing 50,000 ac-ft/yr of water. We do let our precious heritage slip away if we fail to adopt legally sufficient policies to protect Montana's present and future interests in the 16.68 million acre feet of water that leave the state through the Missouri and the 26 million acre feet that leave the state through the Clark Fork and Kootenai each year.

DETAILED RECOMMENDATIONS AND COMMENTARY

A. REGULATING THE INTERSTATE MOVEMENT OF WATER

1. BAN ON THE EXPORTATION OF WATER

Recommendations:

The committee finds that under appropriate circumstances (and as has been the policy for the last two years) the exportation of Montana's water is not in conflict with the public welfare of its citizens or with the conservation of its waters. Thus, the committee recommends that the statutory ban on the exportation of water from Montana (MCA § 85-1-121), which is scheduled to come back into operation of law on July 1, 1985, should not be allowed to revive. The present freedom for water to move interstate, when coupled with the other recommendations of the committee, should be allowed to continue.

Commentary:

With the passage of HB 908, the 1983 Legislature temporarily suspended the provisions of MCA § 85-1-121 that had prohibited the export of water outside the State of Montana unless approved by the Legislature. This suspension was in response to the uncertainty as to the constitutionality of the statute raised by the U.S. Supreme Court's decision in Sporhase v. Nebraska (1982). In its place, the Legislature expanded the criteria enumerated in MCA § 85-2-311 to guide the issuance of a water permit. By the terms of HB 908, these new provisions are to expire on June 30, 1985, with the revival of the pre-existing law, including the export ban.

The Sporhase decision held that Nebraska's statute, which banned the export of groundwater except under limited circumstances, violated the "dormant" interstate commerce clause. Similar litigation concerning the constitutionality of New Mexico's own anti-export ban has been underway in the case of El Paso v. Reynolds. Also, the case of Altus v. Carr (1966) found unconstitutional a Texas statute almost identical to MCA § 85-1-121.

While not completely free of ambiguity, these cases give us helpful guidance in evaluating the constitutionality of Montana's export ban. While each of these three cases involved a prohibition on the exportation of groundwater, we should expect no different analysis by the courts when a state attempts to ban the exportation of surface water. In fact, surface water is more of an interstate commodity than groundwater and invites more scrutiny from the courts in application of the interstate commerce clause.

The conclusion seems inescapable that the provisions of MCA § 85-1-121 are unconstitutional. It is true that the Sporhase decision, in general, allows a state to impose some burdens on interstate commerce as a result of its water management policies and specifically allows measures by arid states to achieve water conservation for health, welfare, and safety purposes. Such restraints must, however, be closely tailored to achieve the conservation purposes intended.

The provisions of MCA § 85-1-121 fail to achieve such a closely tailored fit. While the section does not impose an absolute ban on

exporting, due to the Legislature's ability to approve such a diversion, the discretion given to the Legislature is unduly broad. No criteria to guide the Legislature's consideration of an export petition are set forth; thus, the decision could be made on any basis. Also, the export petition is not required to be reviewed by DNRC prior to its submission to the Legislature. Consequently, there is no assurance that an export petition would ever be subjected to expert water management scrutiny so as to determine whether the proposal threatens to endanger the health, welfare, or safety of Montanans.

The Legislature has not been faced with a petition for the exporting of water so it is uncertain how such a petition would be processed. While it is possible that the constitutionality of the statute could be salvaged by careful legislative scrutiny of the petition on the basis of water conservation considerations, the Legislature would still face a heavy burden of justifying any denial.

Proposed language:

[See Section 24 of the bill]

2. PERMIT CRITERIA

Recommendation:

The committee recommends that the public interest considerations enacted in 1983, which govern the issuance of water permits in the state (MCA § 85-2-311), be continued. The committee suggests that these criteria be strengthened by including provisions which were recently approved by a federal court in New Mexico. The committee also suggests that, in certain instances, these public interest criteria apply to applications for a change in use of water. Under certain circumstances, the Department of Natural Resources and Conservation should undertake rulemaking to more completely implement the permit criteria.

Commentary:

In 1983, the Legislature strengthened the criteria contained in MCA § 85-2-311 governing the issuance of water permits. This modification, effective for two years, added the following major features to the criteria (commonly called "public interest criteria"). In permit applications for appropriations of 10,000 ac-ft/yr or more or 15 cfs or more:

(1) a determination that the proposed appropriation is "reasonable" based on the following considerations:

(a) existing and future demands for water;
(b) anticipated benefits to the applicant and state;
(c) effects on the quantity and quality of water;
(d) possibility of saline seep; and
(e) probable, significant adverse environmental impacts; and

(2) for consumptive diversions in these amounts, approval of the Legislature.

These provisions are scheduled to expire on July 1, 1985; and the old version of section 85-2-311 is scheduled to revive. The committee, however, has received favorable public comment concerning the temporary provisions of MCA § 85-2-311. In general, the committee believes such provisions can safeguard many of the state's concerns about the export of water and coal slurry pipelines and should be reenacted.

Additionally, however, the committee believes that several provisions drawn from New Mexico (and that have been approved by the federal district court there), if coupled with Montana's statute, could significantly protect Montana's valid interest when proposals are made to move water interstate. Specifically, proposals for the out-of-state movement of water would have to be evaluated against the following additional criteria:

(1) whether there are water shortages in Montana;

(2) whether water subject to the application could feasibily be transported to alleviate shortages in Montana;

(3) the sources of water available to the applicant in the state of destination; and

(4) the demand being placed on the applicant's sources and supply in the state of destination.

Acting upon the recommendation of DNRC, the committee believes the water quantity necessary to trigger application of the public interest criteria should be reduced to 4000 ac-ft/yr or more and 5.5 cfs or more. This reduction would not be onerous to applicants as only 56 out of more than 8,000 permit applications since 1973 have been of this magnitude.

At present, the protective public interest criteria do not apply to change of use applications for existing water rights. Thus, existing water rights might be transferred to another use although, under the public interest criteria, water could not be appropriated for such a use. In order to ensure that the public interest criteria apply across the board, the committee recommends their application to certain change of use applications of 4,000 ac-ft/yr or more and 5.5 cfs or more.

Proposed language:

[See Sections 4 through 7 of the bill]

3. WATER FOR COAL SLURRY PURPOSES

Recommendations:

The committee recommends that Montana's ban on the use of water as a medium to transport coal in a pipeline be removed. The use of water in a coal slurry pipeline should be recognized as a beneficial use of water. This recommendation is expressly conditioned on the passage of other recommendations made by the committee to protect the state, its environment, and its citizens from the potential damage that can be caused by such pipelines.

Commentary:

Section 85-2-102, MCA, defines the beneficial use of water to mean a use of water for the benefit of the appropriator, other persons, or

the public, including but not limited to agricultural (including stock water), domestic, fish and wildlife, industrial, irrigation, mining, municipal, power, and recreational uses. Also, MCA § 85-2-103 makes clear: "(1) the Legislature finds that the use of water for the slurry transport of coal is detrimental to the conservation and protection of the water resources of the states; and (2) the use of water for the slurry transport of coal is not a beneficial use of water."

The coal slurry ban, as presently constituted, results in some potentially strange results. Surprisingly, it bans neither the transport of coal by pipeline nor the use of water in a pipeline. What it does ban is the mixing of the two substances in a pipeline.

A coal slurry pipeline can be built and operated in the state so long as the medium for transport is other than water (e.g., methane, liquid carbon dioxide). Also, water can be used as the medium in a slurry pipeline so long as the substance being transported is not coal (e.g.., grain, other minerals). Even though the coal slurry ban has been justified on the basis of minimizing negative environmental impacts, the construction of a pipeline for the conveyance of coal (without water) or other substances (with or without water) is not subject to permitting under the state's Major Facility Siting Act or any other statewide regulatory scheme (except for possible requirement of an environmental impact statement under the Montana Environmental Policy Act).

The Sporhase case recognizes the legitimacy of state conservation measures "to regulate the use of water in times and places of shortage for the purpose of protecting the health of its citizens...." The questions for Montana, however, become (1) whether such a ban violates the equal protection clause of either the U.S. Constitution or the Montana Constitution; and (2) whether a ban against coal slurry pipelines violates the "dormant" interstate commerce clause of the federal Constitution by impermissibly burdening commerce between the states.

Numerous experts have provided the committee with their views as to the constitutionality of the coal slurry ban. Their views have generally been mixed. Supporters of the ban have indicated that Montana has both a strong constitutional and statutory basis for the conservation of natural resources. They argue that coal slurry is a totally consumptive water use, unlike many industrial uses; that it requires continuous, large amounts of coal to operate; and that it has other environmental impacts in the construction and operation of the pipeline. The ban, therefore, represents a state policy whose purpose is to closely regulate the speed and intensity of coal development.

Critics of the statute argue that the coal slurry ban is irrational in relationship to its stated purposes and cannot be sustained. The ban does not conserve coal, as the mineral can be moved by other transportation modes or, even, by pipelines using a transport medium other than water. Nor does the ban conserve water; water can be used for all other forms of pipelines.

Critics of the statutory ban also argue that "coal slurry pipeline transportation systems, simply because of their size and economic scale,

contemplate the interstate movement of coal to distant markets." As these pipelines generally use water as the medium of transport, a ban on the appropriation or use of any water, regardless of its quality, may unreasonably interfere with interstate commerce. Montana's interest in protecting and conserving its waters can be pursued through other means having less impact on interstate commerce.

The committee is of the judgment that the constitutionality of the coal slurry ban could be sustained against an equal protection attack. The committee, however, agrees with the observation of Professor Albert Stone of the University of Montana School of Law: the constitutionality of the coal slurry ban under the interstate commerce clause is "a close question, too close to permit reliance upon the statute." The consequence of the state being wrong in terms of the ultimate defensibility of its ban are severe: the water could be appropriated without significant payment to the state, the pipeline could be constructed outside any significant state regulation (except the Montana Environmental Policy Act), and the state could be liable for the prevailing party's attorneys fees.

Proposed language:

[See Section 25 of the bill]

4. COVERAGE OF PIPELINES UNDER THE MAJOR FACILITY SITING ACT

Recommendation:

The committee recommends that the siting of all future pipelines exceeding 30 miles in length and 17 inches in diameter be covered by the provisions of the Major Facility Siting Act (MFSA). The DNRC should continuously monitor slurry technology to ascertain whether this standard provides sufficient protection to the state.

Commentary:

Montana's Major Facility Siting Act requires that a major facility (usually an energy-related facility) obtain a certificate of environmental compatibility and public need from the Board of Natural Resources and Conservation prior to construction. The certificate is considered by the board only after an extensive application has been submitted with an opportunity for federal, state, and local governmental agencies, as well as the general public, to comment on it. The application also receives a thorough evaluation from DNRC, which forwards its recommendations to the board.

Coverage by the MFSA results in a comprehensive review by the board of numerous environmental and economic considerations. At present, there is limited coverage of pipelines under the Siting Act. Under current law, if pipelines run to or from a large energy facility located in or out of Montana, the pipeline and its associated facilities must be constructed in accordance to a certificate issued by the board. This

application is very limited however in that pipeline developers could easily tailor new coal slurry pipelines to circumvent this limited coverage.

Coverage of certain large pipeline projects under the public need provision of the Siting Act would appear justified on the same basis that other large projects are under the Act: if the public is to invest in public works and services to support the construction and operation of such projects (as well as to mitigate their negative impacts), then the taxpayers should be afforded an independent review of the feasibility of the project.

The committee also feels that environmental compatibility is another reason for which to place large pipelines not running to major energy facilities under the Siting Act. Because the committee is concerned with minimizing environmental damage along the construction route, all pipelines in excess of a certain length and width should be covered.

Proposed language:

[See Sections 8 through 13 of the bill]

B. STATE WATER LEASING PROGRAM

5. LIMITED WATER LEASING PROGRAM

Recommendation:

The committee recommends establishing a limited state water leasing program involving a total of 50,000 acre feet of impounded water. A lease from the state would be required to obtain water in any amount for transport outside the specified river basins or for uses where water in excess of 4,000 ac-ft/yr and 5.5 cfs is consumed. All such leases would be reviewed under the public interest criteria of MCA § 85-2-311; and an environmental impact statement would be required in most instances. Lease terms would be 50 years or less and could be renewed.

Commentary:

The details of the limited water leasing program recommended by the committee are as follows. Administered by DNRC, water would be leased from the state under two prospective circumstances:

(a) whenever water in any amount is being sought for transport out of the following river basins: the Clark Fork River and its tributaries to its confluence with Lake Pend Oreille in Idaho; the Kootenai River and its tributaries to its confluence with Kootenay Lake in British Columbia; the St. Mary River and its tributaries to its confluence with the Oldman River in Alberta; the Little Missouri River and its tributaries to its confluence with Lake Sakakawea in North Dakota; the Missouri River and its tributaries to its confluence with the Yellowstone River in North Dakota; and the Yellowstone River to its confluence with the Missouri River in North Dakota; or

(b) for uses where water in excess of 4,000 ac-ft/yr and 5.5 cfs would be consumed.

Only a total of 50,000 ac-ft/yr of water could be leased under this program for the foregoing two purposes. As water was leased, water would be appropriated in the name of the State of Montana and a certificate issued to DNRC. In the event lease applications exceeded 50,000 ac-ft/yr, DNRC would have to return to the Legislature for additional leasing authority.

The source of water for the leasing program would be impounded water from any reservoir within Montana. Water could not be leased from a reservoir in a basin for which a pending or final decree under the general stream adjudication program had not been entered. This restriction would not apply to Fort Peck, for which the state has an existing water purchase and revenue sharing agreement with the U.S. Bureau of Reclamation, and Tiber, Canyon Ferry, Hungry Horse and Yellowstone reservoirs, once memoranda of agreement have been executed. The committee strongly urges that DNRC negotiate (or renegotiate, in the case of Fort Peck) memoranda of agreement covering all federal reservoirs within the state and water purchases for all types of uses (not just industrial).

Water would be leased through bilateral negotiations. Upon receipt of an application to lease water, DNRC would evaluate the proposal with reference to the public interest criteria of MCA § 85-2-311(2) [as proposed in this report], regardless of the amount of water involved. For proposals involving less than 4,000 ac-ft/yr and less than 5.5 cfs, however, an environmental impact statement would be required only in the discretion of DNRC under its Montana Environmental Policy Act (MEPA) rules and whenever the cumulative effect of several small applications caused a significant environmental impact.

Water would be leased for terms not to exceed 50 years, although the term could be renewed. DNRC could require that 25 percent of project capacity be set aside for municipal and rural purposes (upon payment by the municipal or rural government entity of the costs of tie-in). Any other terms or conditions would be determined by DNRC through negotiations.

Proposed language:

[See Section 14 of the bill]

6. USE OF WATER LEASING PROCEEDS

Recommendation:

The committee recommends that proceeds from a water leasing program should be used to develop a sound water policy and water development program in Montana. Some possible uses of water leasing proceeds that were suggested by the committee are as follows:

(a) all proceeds paid into the general fund;

(b) to administer a water leasing program;

(c) to support the water courts in their adjudication of water rights;

(d) to be deposited in the water development earmarked account within the earmarked revenue fund established in MCA 17-2-102;

(e) to provide a centralized water resource data management system as described in this committee's recommendations;

(f) to provide technical and financial assistance to applicants for water reservations and to perfect existing water reservations in the Yellowstone River Basin;

(g) to repair and restore existing state-owned dams as required for safety reasons and/or to expand their beneficial use.

(h) to provide for development of water projects including off-stream storage sites that are necessary to meet existing and future water demands;

(i) to repair and restore existing municipal water supply systems;

(j) to provide installation of rural water supply systems in areas of critical need;

(k) to develop an inventory and classification of the state's groundwater resources;

(l) to provide expenses and administrative costs of a water policy committee as recommended by the Select Committee on Water Marketing;

(m) to purchase public access sites for recreational use of streams and lakes;

(n) to fund water conservation measures;

(o) to fund research on improved irrigation systems and water conservation measures especially suitable for Montana;

(p) to complete soil surveys and mapping of the state and the identification of land areas suitable for irrigation; and

(q) to further efforts to prepare for interstate litigation and negotiations.

7. ACQUISITION OF WATER FROM FEDERAL RESERVOIRS

Recommendation:

The committee recommends that the DNRC be granted continued authority to acquire water from all federal reservoirs in the state (as is now the policy under the temporary two-year modification to this section). The committee recommends that the department's authority be clarified to allow acquisition for "any beneficial use."

The existing agreement with the Bureau of Reclamation for the state's acquisition of water from Fort Peck limits the acquisition to industrial water. Under the current agreement the Bureau could sell large amounts of water for nonindustrial purposes and avoid sharing revenues with the state. The committee strongly urges that this agreement be renegotiated, and all future agreements be negotiated to cover water for any beneficial use.

Proposed language:

[See Section 15 of the bill]

C. MAXIMIZING MONTANA'S FAIR SHARE OF MISSOURI RIVER BASIN WATER "GETTING MONTANA'S HOUSE IN ORDER"

8. GENERAL STREAM ADJUDICATION

Recommendation:

The committee urges an expeditious and accurate completion of the statewide water adjudication process. The committee strongly urges that priority be given to prompt and accurate adjudication of the Missouri River Basin. The committee recommends that the Legislature support any justified funding request from the water courts.

Commentary:

The adjudication of pre-1973 water rights presently underway in the five water courts of the state is essential to protect future water needs in Montana. To date, three final decrees involving 10,715 claims have been entered; and 26 sub-basins, involving 46,726 claims, are predicted to be covered by preliminary decrees by the end of 1984.

Chief Water Judge W. W. Lessley has indicated that the adjudication process for the 200,000 plus claims that are now on file will be completed by 1990. To ensure the process is completed on schedule the Legislature should support the court's funding request.

9. INDIAN AND FEDERAL RESERVED WATER RIGHTS

Recommendation:

The committee recommends support for legislation that would provide a two year extension of the Reserved Water Rights Compact Commission in its efforts to negotiate federal and Indian reserved water rights. The committee recommends that adequate funds be appropriated for the Reserved Water Rights Compact Commission to accomplish its goals.

Commentary:

The committee recognizes an urgency to conclude the equitable adjudication of Indian and federal reserved water rights. Unquantified reserved water right claims hamper the ability of the state to complete the statewide adjudication of water rights, interfere with water resource planning, and limit the state's ability to prepare for interstate apportionment of the Missouri River.

In the event the Legislature chooses to renew the charter of the commission, the level of resources dedicated to the compact commission should be examined. The Legislature might encourage the development of joint water project proposals with Indian tribes as a means to satisfy both Indian claims and state needs.

10. WATER RESOURCES DATA MANAGEMENT SYSTEM

Recommendation:

The committee recommends the establishment within DNRC of a centralized water resources data management system. The system would make

readily accessible to the state's policymakers necessary information on the state's water resources, existing and projected uses, and existing and projected demands. The committee also recommends that $50,000 per year for each of the next five years be allocated for the development of such a system.

Commentary:

In the 1982 Trelease study done for DNRC, the authors found that:

> "In order to make their specific decisions, each agency collects the necessary data which are stored in separate agency files and, in many cases, are difficult to relocate. At the present time much of the water resource data is fragmented, neither indexed nor inventoried, not recorded in a standard format, and most importantly, not readily accessible to those who need the information for making management decisions."

The study also reported that the state does not presently maintain data as to amount of water actually used by water claimants. Thus, the existing method reports maximum legal use rather than actual diversion.

The Trelease study suggested that centralized information is needed on the state's water resources, existing uses, and the potential for future development. As previously stressed in the present report, "the identification of existing uses and future development potential is Montana's only line of defense to obtain a fair share in any interstate allocation." Specifically, the Trelease report suggested a centralized water resources data system should have five objectives: (1) to inventory and index the location of all pertinent water resource data; (2) to assess the accuracy and completeness of existing data (remove all duplication); (3) to standardize data collection procedures; (4) to develop and implement a centralized data system that is easily accessible in a useable format to all users; and (5) to establish a continuous and integrated water resource data collection and management program. To meet this need, the Trelease report recommended the allocation of $50,000 per year for the next five years for the development of such a centralized water resources data system.

Such a data system is important both to current Montana users and potential users, as well as to the state as it develops interstate water policy. The committee is concerned, however, about relying entirely on one data system to report on present and future supply and demand. The Legislature may well wish for its Water Policy Committee, recommendation 14, to undertake verification of water resource data maintained by DNRC. The purpose of the verification would not be to duplicate functions already performed by the agency but to challenge or confirm the methodological assumptions and to systematically spot-check the data. The function would go a long way in raising the level of confidence of Montana policymakers, including the Legislature and the department itself, in the water resource data that they utilize in determining their long-term water policy.

Proposed language:

[See Section 18 of the bill]

11. WATER RESERVATION SYSTEM

Recommendation:

The committee recommends an aggressive use of the water reservation system as provided in MCA § 85-2-316 to plan for and set aside water for the anticipated future needs of the state. To accomplish the reservation of waters, the committee further recommends the following:

(1) The Legislature should encourage the water reservation process by appropriating sufficient funds for technical and financial assistance to the appropriate state agencies and other political subdivisions that are authorized to reserve water.

(2) The Legislature should appropriate funds to increase the monitoring and review of existing water reservations in the Yellowstone River Basin to ensure that progress is made in perfecting these reservations.

(3) The Legislature should mandate and fund an expedited reservation process for the Missouri River Basin.

(4) Reserved waters should be exempt from the leasing program.

(5) Reservations for use of water out-of-state should be evaluated against public interest criteria based on the New Mexico statute (see Section 2).

Commentary:

Accurate predictions of future water needs are important both to water resource management within the state and in preparation for negotiations or litigation with other states. Such information is also essential in dealing with Congress concerning water project funding and other issues, such as a Congressional apportionment of the Missouri.

Montana's innovative water reservation system is a systematic means to identify future uses in a basin. While reservations operate like permits in that they are protected in most cases from subsequent appropriations within the state, they may not be recognized as inchoate permits in an interstate apportionment action. But to the extent the reservation process represents a well-conceived attempt by Montana to manage and plan for the necessary future uses of its water, established reservations should be persuasive to the courts and Congress.

Reservations have been completed in the Yellowstone River Basin but the committee recognizes an urgent need to proceed with the reservation process on other major river basins. Because of downstream states' interests in the Missouri River Basin, the committee has recommended special attention be given to water reservations in this basin.

There are uncertainties regarding some water rights in the Upper Missouri River Basin but the committee urges that the planning and technical efforts required for water reservations be initiated.

The successful development of water reservations in the Missouri River Basin will require sufficient financing and technical expertise to assist state and local government entities in initiating and completing the process.

The 1982 Trelease study done for the DNRC stated:

"It is critically important that the water reserved under the Yellowstone reservation process be developed within a reasonable time frame and that the reservants adhere to the schedule stipulated by the Board of Natural Resources and Conservation in the Reservation Order. This process must be able to withstand an equitable apportionment lawsuit among the Missouri Basin states. The Montana legislature realized this and allocated funds for administrative and technical assistance to the Yellowstone conservation districts in developing their reservations. The state should continue to closely monitor the development of these reservations to assure compliance with the Board reservation order."

The committee agrees with the Trelease recommendation and urges the Legislature to provide funding for additional technical and financial assistance to assure perfection of the Yellowstone reservations.

Proposed language:

[See Sections 16 and 17 of the bill]

12. STATE WATER PLAN

Recommendation:

The committee strongly urges DNRC to comply with the provisions of MCA § 85-1-203 which requires the preparation of a state water plan, its approval by the Board of Natural Resources and Conservation, and its submission to each general session of the Legislature. Also, the committee urges state officials and the state's Congressional delegation to pursue federal policies consistent with and in furtherance of the state water plan.

Commentary:

Section 85-1-203, MCA, which was originally passed in 1967 and revised in 1974, requires that the DNRC formulate, and, with the approval of the Board, adopt "a comprehensive, coordinated, multiple-use water resources plan" for the state. The plan, which can be formulated and approved in sections, is required to set forth "a progressive program for the conservation, development, and utilization of the state's water resources and to propose the most effective means by which these water resources may be applied for the benefit of the people." The section requires that the plan be adopted only after properly noticed public hearings. Additionally, the plan must be submitted to each general session of the Legislature.

While DNRC has undertaken many specific water studies in the state, it is unclear whether those are considered by the department as being the state water plan. There have been no public hearings advertised in accordance with the statute. The Board has not approved any document or set of documents or component of the plan. Most importantly, no such plan has been submitted to the Legislature in preceding sessions.

Although DNRC has given indications that such a "plan" will be submitted to the 1985 Legislature, whether it will have been scrutinized through the required public hearings is unclear. Thus, if the plain language of section 85-1-203 is applied, Montana does not have a state water plan.

Compliance with section 85-1-203 is no mere procedural nicety. It is an indispensable prerequisite for demonstrating, in any interstate apportionment action, that Montana has systematically and thoughtfully planned for its water future. The state is vulunerable to the extent it does not comply with its own statutory requirements for the development of the state water plan. Montana's equities are improved in an interstate setting if it develops a plan demonstrated as such and involving the public and the Legislature.

13. WATER DEVELOPMENT

Recommendation:

The committee recommends continued funding and bonding capacity for the identification, development, and construction of water projects within the state. The Department of Natural Resources and Conservation should prioritize potential federal projects that would qualify under the Pick-Sloan Plan and report this listing to the Legislature each biennium. In addition to monitoring developments and issues that affect the state, Montana's existing Washington, D.C. staff, in conjunction with the state's Congressional delegation, should work toward the authorization and funding of such projects.

Commentary:

Putting water to use is important for buttressing Montana's claim to its fair share of Missouri Basin water, and water development is important for putting the water to use.

While DNRC has pursued federal funding on projects such as on the Milk River, more could be done to see authorization or funding for water development projects which would qualify under the Pick-Sloan Plan. In the proposed amendments, the committee seeks to require DNRC, as a part of its biennial report to the legislature, to identify such potential projects and specify the efforts it will undertake to secure this authorization and funding. Also, the committee urges Montana's Washington, D.C. office and Congressional delegation to support these efforts.

Proposed langage:

[See Section 20 of the bill]

14. WATER POLICY COMMITTEE

Recommendations:

The committee recommends the creation of a permanent legislative water policy committee to advise the Legislature, in an ongoing manner, on water policy and issues of importance to the state.

Commentary:

Water is a resource particularly important to the future of Montana. Policies concerning water must not be made in a vacuum. Coordinated and well-reasoned policies must be developed with the participation of the Legislature, other involved agencies, and the public. In exercising its role in appropriating money or approving compacts, the Legislature must understand the context of such actions and must accept them as integral parts of an overall state water strategy. Likewise, other agencies must be able to express their concerns about proposed policies and be able to express their concerns about proposed policies and be able to coordinate their own actions. Finally, the general public must understand the rationale for water policies so as to be supportive; and many citizens have valuable expertise to render in the development of water policy. These concerns argue for the creation of a permanent committee devoted to monitoring Montana's water policy.

During the next biennium, particularly important issues for discussion by such a committee could include:

- o constraints on consumptive use and water development brought about by extensive hydropower reservations in both the Missouri and Yellowstone basins;
- o oversight of the quantification of pre-1973, Indian, and federal reserved water rights;
- o the adequacy of the state's water resources data system, including the consideration of the adequacy of water research currently underway in state agencies and institutions, in meeting state policy and management needs;
- o the content of the state water plan and water development plan; and/or
- o the status of the state water reservation program.

The committee could be of particular value in developing communications with similar bodies in other Missouri Basin states.

Proposed language:

[See Section 21 of the bill]

"RELATING TO OTHER STATES IN THE MISSOURI RIVER BASIN"

15. PREPARATION FOR NEGOTIATIONS AND POSSIBLE LITIGATION

Recommendation:

The committee recommends that Montana prepare for negotiations and potential litigation with other Missouri River Basin states. Such preparation might include:

(a) the establishment of a litigation contingency fund for the office of the attorney general;

(b) the development of a clear understanding between the Attorney General's office and DNRC as to their respective responsibilities for preparing for litigation and negotiations;

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February 1, 1985

TO: Legislators and Other Interested Persons

FROM: The Environmental Quality Council

RE: Informational Meeting on Proposed Legislation -- February 7

There will be an informational meeting conducted Thursday, February 7, 1985, beginning at 7:00 p.m. in the House Chambers to review legislation and other recommendations proposed by the Select Committee on Water Marketing. The agenda is as follows:

I. Welcome, introduction and review of format of briefing
...Rep. Iverson

II. Review of history, issues and work of Select Committee
...Sen. Blaylock

III. Regulating the interstate movement of water
...Mr. Kemmis

IV. State water leasing
...Mr. Shontz

V. Maximizing Montana's fair share of Missouri River Basin water: "Getting Our Own House in Order"
...Rep. Harp

VI. Maximizing Montana's fair share of Missouri River Basin water: "Relating to Other States"
...Sen. Eck

VII. Review of public comment
...Sen. Shaw

VIII. Position of the Department of Natural Resources and Conservation
...Larry Fasbender, DNRC Director

IX. Questions and answers
...Legislators and Public

I. federal gov can sell H_2O in reservoir

II. State " " " " " "

III. Private " " " " " "

IV. Tribes " " " " " "

V. Max. least 50 years

VI. Strictly leasing, not sales

VII. Adjudication complete before leasing

VIII. Stored water

IX. Long-term water policy

Present Possibilities for Water Sales

INTERESTED PARTY	WHO SELLS?	CONSIDERATION PAID WHOM?	STATE JURISDICTION?
Approaches federal government for industrial water from			
Fort Peck[a]	Option to State	Equally to State & Federal gov. if Sold by State	Whether State Sells or Not
Yellowtail, Tiber, Canyon Ferry[b]	Same	Same	Same
Other Reservoirs (Hungry Horse, (Clark Canyon, Gibson)	Federal Government	To Federal Government	Probable[c]
Appoaches federal government for water for other purposes	Federal Government	To Federal Government	Probable[c]
Approaches state for water from state reservoirs (for any beneficial use)	State Government	To State	Yes
Approaches private party for water for any beneficial use	Private Party	To Private Party	Change of Use Review[d]
Appropriates water in own name for any beneficial use; perhaps later transfer of use (including to an out-of-state location)	No Sale; Simply Application for Permit	None Paid	Public Interest Criteria[e]; Perhaps Change of Use[f] or MFSA[g]
Indian tribe	Tribe	Tribe	Probable jurisdiction over off reservation movement or use of water

[a] Under Memorandum of Agreement dated _____.
[b] Under Proposed Memorandum of Agreement drafted in 1984.
[c] So long as State conditions do not defeat primary purpose of federal project. *United States v. California (New Mellones Dam)*, ___F.2d ____(Dec. 20, 1982).
[d] MCA § 85-2-402 (1983).
[e] MCA § 85-2-311 (1983).
[f] MCA § 85-2-402 (1983).
[g] MCA §75-1-101 *et seq.* (1983).

MOVEMENT OF APPROPRIATED, LEASED, AND RESERVED WATER UNDER SELECT COMMITTEE'S BILL

PREPARED BY STAFF
SELECT COMITTEE ON WATER MARKETING
MONTANA LEGISLATURE

February 7, 1985

Variable	<4000/5.5 diverted <4000/5.5 consumed	>4000/5.5 diverted <4000/5.5 consumed	>4000/5.5 diverted >4000/5.5 consumed
Movement of previously appropriated water for use:			
Out-of-basin	Possible, but subject to level 1 public interest criteria as applied in change in appropriation right procedure	Possible, but subject to level 2 public interest criteria as applied in change in appropriation right procedure	Possible, but subject to level 3 public interest criteria (legislative approval) as applied in change in appropriation right procedure
Out-of-state	Possible, but subject to level 1 public interest criteria and special out-of-state criteria as applied in change in appropriation right procedure	Possible, but subject to level 2 public interest criteria and special out-of-state criteria as applied in change in appropriation right procedure	Possible, but subject to level 3 public interest criteria (legislative approval) and special out-of-state criteria as applied in change in appropriation right procedure
Is appropriation possible?	Yes	Yes	No; water must be leased
Movement of water appropriated in future for use:			
Within basin (and within state)	Possible, but subject to level 1 public interest criteria as applied in permit procedure	Possible, but subject to level 2 public interest criteria as applied in permit procedure	Impossible; water in this amount cannot be appropriated regardless of where used; must be lease

Variable	<4000/5.5 diverted <4000/5.5 consumed	>4000/5.5 diverted <4000/5.5 consumed	>4000/5.5 diverted >4000/5.5 consumed
Out-of-basin (but within state)	Impossible; water cannot be appropriated for use out-of-basin; water must be leased	Impossible; water cannot be appropriated for use out-of-basin; water must be leased	Impossible; water in this amount cannot be appropriated regardless of where used; must be leased
Out-of-state (but within basin)	Possible, but subject to level 1 public interest criteria as applied in permit procedure	Possible, but subject to level 2 public interest criteria as applied in permit procedure	Impossible; water in this amount cannot be appropriated regardless of where used; must be leased
Out-of-state (and out-of-basin)	Impossible; water cannot be appropriated for use out-of-basin; water must be leased	Impossible; water cannot be appropriated for use out-of-basin; water must be leased	Impossible; water in this amount cannot be appropriated regardless of where use; must be leased
Movement of water leased in future for use:			
Within basin (and within state)	Leasing optional as water can be appropriated (but subject to level 1 public interest criteria in permit procedure)	Leasing optional as water can be appropriated (but subject to level 2 public interest criteria in permit procedure	Leasing mandatory for water in this amount regardless of where used
Out-of-basin (but within state)	Leasing mandatory for any use out-of-basin	Leasing mandatory for any use out-of-basin	Leasing mandatory for water in this amount regardless of where used
Out-of-state (but within basin)	Leasing optional as water can be appropriated (but subject to level 1 public interest criteria and special out-of-state criteria in permit procedure	Leasing optional as water can be appropriated (but subject to level 2 public interest criteria and special out-of-state criteria in permit procedure	Leasing mandatory for water in this amount regardless of where used

Variable	<4000/5.5 diverted <4000/5.5 consumed	>4000/5.5 diverted <4000/5.5 consumed	>4000/5.5 diverted >4000/5.5 consumed
Out-of-state (and out-of-basin)	Leasing mandatory for any use out-of-basin	Leasing mandatory for any use out-of-basin	Leasing mandatory for water in this amount regardless of where used
Water reserved for future use:			
Within basin	Leasing optional	Leasing optional	Leasing optional
Out-of-basin (but within state)	Cannot reserve for out-of-basin use; leasing mandatory for any out-of-basin use	Cannot reserve for out-of-basin use; leasing mandatory for any out-of-basin use	Cannot reserve for out-of-basin use; leasing mandatory for any out-of-basin use
Out-of-state (but within basin)	Leasing optional	Leasing optional	Leasing optional
Out-of-state (and out-of-basin)	Cannot reserve for out-of-basin use; leasing mandatory for any out-of-basin use	Cannot reserve for out-of-basin use; leasing mandatory for any out-of-basin use	Cannot reserve for out-of-basin use; leasing mandatory for any out-of basin use

Explanatory Notes:

"Level 1 public interest criteria" refers to that criteria enumerated in LC 660 at Section 4(1), for permit applications, and Section 7(2), for changes in appropriation rights.

"Level 2 public interest criteria" refers to that criteria enumerated in LC 660 at Section 4(2), for permit applications, and Section 7(3), for changes in appropriation rights.

"Level 3 public interest criteria" refers to that criteria enumerated in LC 660 at Section 7(4), for changes in appropriation rights.

"Special out-of-state criteria" refers to that criteria enumerated in LC 660 at Section 4(3), for permit applications, and Section 7(5), for changes in appropriation rights.

"Basins" refer to any of the following river and their tributaries: the Clark Fork, the Kootenai, the St. Mary's, the Little Missouri, the Missouri (to its confluence with the Yellowstone, and the Yellowstone.

(c) the development of Montana's legal, economic, and equitable arguments in support of the apportionment of Missouri River water contained in the O'Mahoney-Milliken Amendment;

(d) the requirement that DNRC and, perhaps, the Attorney General's office submit annually to the Water Policy Committee and biannually to the Legislature a detailed report concerning Montana's strategy for interbasin litigation and negotiations; this report would also review the steps being undertaken in preparation for litigation and negotiation; the departments would be authorized to submit all or part of this report in confidence to the committee and Legislature if public disclosure would jeopardize litigation or negotiation strategies;

(e) the monitoring of federal and regional activities which affect Montana's water interests (especially water project funding and coal slurry legislation);

(f) intensive modeling of the interests and anticipated water strategies of other basin states; perhaps DNRC should be requested to undertake a detailed and systematic examination of compact experiences elsewhere in the United States and Canada; such an examination would include identifying contentious issues and how they were resolved, studying negotiation strategies and pitfalls, and applying the lessons of these experiences to Montana's situation;

(g) perhaps an interagency litigation and/or negotiation task force needs to be established to expedite preparations; a liaison from the legislative water policy committee also might be desirable; and

(h) perhaps issues remaining outstanding from the execution of the Yellowstone River Compact shall be resolved.

The committee recommends that money be appropriated to support these efforts.

Commentary:

Montana needs to have a thoughtful strategy regarding its relationship with other states in the Missouri River Basin. This strategy must encompass what policies Montana wishes to work for in the basin, as well as what posture Montana will take in relation to the actions of the other basin states. This strategy requires preparation for both litigation and negotiation.

While nonjudicial conflict resolution is preferable in most instances, it is inevitable that the State of Montana will have to engage in some litigation concerning Missouri Basin water issues. The Attorney General's office and DNRC must be prepared for the inevitability of such litigation. The Trelease report recommended several measures to prepare the state: a contingency fund for litigation; further development of Montana's position based on the O'Mahoney-Milliken Amendment; monitoring federal and regional development; and, modeling other states' interests and strategies.

Even though there is growing interest in the negotiation of an interstate compact to apportion the waters of the Missouri River among the basin states, some observors believe that none of the states are ready for a compact. As for Montana, the Trelease report suggests that there is the preliminary need to resolve some of the unresolved issues

remaining from the execution of the Yellowstone River Compact among Montana, Wyoming, and North Dakota.

16. EFFORTS TOWARD CONFLICT RESOLUTION IN THE MISSOURI RIVER BASIN

Recommendation:

The committee recommends that efforts toward reducing conflict among the states of the Missouri River Basin be given high priority by Montana. One result might be an interstate compact although many issues may be resolved by less formal means. The DNRC should be the lead negotiating agent for the state, but the legislative water policy committee (proposed in recommendation 14) should meet with and engage in discussions with similar legislative groups from other basin states. Montana should host a conference or other appropriate gathering of legislators and executive branch personnel from other basin states as one means to further discussions. Also, Montana should pay its dues to the Missouri Basin States Association.

Commentary:

It is predictable that the waters of the Missouri River Basin will eventually be allocated among the ten member states in the basin. That apportionment could come about through litigation, Congressional action, or interstate compacting.

The provisions of the O'Mahoney-Milliken Amendment, which give the state preference with consumptive uses over the navigation uses downstream, would be to Montana's advantage in litigation. Yet, as the lower states develop (probably at a rate faster than Montana), they will be putting water to use for municipal and industrial purposes - uses not automatically subordinated under the O'Mahoney-Milliken Amendment. As the water is put to use, the equities shift to the lower basin; and the U.S. Supreme Court, in an equitable apportionment criteria, is reluctant to reduce existing uses. Also, lower basin states may have the political clout to modify the Amendment; and, since they benefit from water not put to use upstream, they have a political incentive not to support upstream water development.

To protect its future claims to water, Montana might, on the one hand, undertake rapid water development or, on the other hand, rely on water planning and the water reservation process. But water development, though effective in making claim to the water, is expensive; and water planning and reservations, though relatively inexpensive, are of somewhat unknown value in interstate litigation.

Through effective communication with other basin states, conflicts can be resolved. Interstate compacting, in particular, offers an appealing alternative. Once executed, a compact can provide certainty in terms of present and future water entitlements. A well-written compact negates adverse judicial action and, once ratified by Congress, places the interstate settlement in most instances beyond the subsequent reaches of Congress. Expensive water development need not be undertaken solely to establish water rights.

Yet, compacts do not solve everything. Many issues, such as Indian water rights, are typically not covered by such agreements. Also, in undertaking negotiations, states must be well prepared as to data covering the resource and their own present and future needs and expectations. Successful compacting requires a high level of commitment by each of the individual states.

So long as the state's negotiators are well prepared, Montana has little to lose and much to gain by actively pursuing a compact among the states in the basin.

D. MISCELLANEOUS PROVISIONS

17. MISCELLANEOUS PROVISIONS

Recommendation:

The committee recommends the passage of certain technical provisions in addition to the substantive provisions set forth in the foregoing.

Proposed language:

[See Sections 22-29 of the bill]

_____ BILL NO. _____

INTRODUCED BY. _____

BY REQUEST OF THE SELECT COMMITTEE ON WATER MARKETING

A BILL FOR AN ACT ENTITLED: "AN ACT REVISING STATE WATER POLICY TO MAXIMIZE MONTANA'S INTERESTS IN THE INTERSTATE ALLOCATION OF WATER; AMENDING CRITERIA FOR WATER APPROPRIATION AND CHANGES IN APPROPRIATION; PROVIDING FOR A LIMITED WATER LEASING PROGRAM; EXEMPTING WATER RESERVATIONS FROM THE LEASING PROGRAM; PLACING CERTAIN PIPELINES UNDER THE MONTANA MAJOR FACILITY SITING ACT; PROVIDING FOR WATER RESERVATIONS IN THE MISSOURI RIVER BASIN; ESTABLISHING A WATER RESOURCES DATA MANAGEMENT SYSTEM; CREATING A PERMANENT WATER POLICY COMMITTEE; REPEALING THE BAN ON THE USE OF WATER FOR COAL SLURRY; AMENDING SECTIONS 75-20-104, 75-20-216, 75-20-218, 75-20-303, 75-20-304, 75-20-1202, 85-1-203 THROUGH 85-1-205, 85-1-621, 85-2-102, 85-2-112, 85-2-122, 85-2-124, 85-2-301, 85-2-311, 85-2-312, 85-2-316, 85-2-402, MCA, AND SECTION 7, CHAPTER 706, LAWS OF 1983; REPEALING SECTION 85-2-104, MCA; AND PROVIDING AN EFFECTIVE DATE AND AN APPLICABILITY DATE."

WHEREAS, the Select Committee on Water Marketing was commissioned by the 1983 Legislature to undertake a study of the advantages and disadvantages of water marketing; and

WHEREAS, the Select Committee in completing its study determined that Montana needs to address broader questions of water policy in order to secure Montana's interests in allocation and management of state waters; and

WHEREAS, the Select Committee has presented a comprehensive package of recommendations that must be considered as a whole; and

WHEREAS, these recommendations serve to revise Montana's water policy in order to maximize Montana's authority over management of state waters and other natural resources and to conserve water for existing and future beneficial uses by Montanans.

THEREFORE, the Legislature of the State of Montana finds that this legislation and other recommendations of the Select Committee on Water Marketing constitute an appropriate revision of state water policy necessary to secure Montana's interests for present and future benefit to Montanans.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

Section 1. Section 85-2-102, MCA, is amended to read:

"85-2-102. Definitions. Unless the context requires otherwise, in this chapter the following definitions apply:

(1) "Appropriate" means to divert, impound, or withdraw (including by stock for stock water) a quantity of

water or, in the case of a public agency, to reserve water in accordance with 85-2-316.

(2) "Beneficial use", unless otherwise provided, means:

(a) a use of water for the benefit of the appropriator, other persons, or the public, including but not limited to agricultural (including stock water), domestic, fish and wildlife, industrial, irrigation, mining, municipal, power, and recreational uses; and

(b) a use of water appropriated by the department for the state water leasing program under [section 14] and of water leased under a valid lease issued by the department under [section 14].

(3) "Board" means the board of natural resources and conservation provided for in 2-15-3302.

(4) "Certificate" means a certificate of water right issued by the department.

(5) "Change in appropriation right" means a change in the place of diversion, the place of use, the purpose of use, or the place of storage.

~~(5)~~(6) "Declaration" means the declaration of an existing right filed with the department under section 8, Chapter 452, Laws of 1973.

~~(6)~~(7) "Department" means the department of natural resources and conservation provided for in Title 2, chapter

15, part 33.

~~(7)~~(8) "Existing right" means a right to the use of water which would be protected under the law as it existed prior to July 1, 1973.

~~(8)~~(9) "Groundwater" means any water beneath the land surface or beneath the bed of a stream, lake, reservoir, or other body of surface water, and which is not a part of that surface water.

~~(9)~~(10) "Permit" means the permit to appropriate issued by the department under 85-2-301 through 85-2-303 and 85-2-306 through 85-2-314.

~~(10)~~(11) "Person" means an individual, association, partnership, corporation, state agency, political subdivision, the United States or any agency thereof, or any other entity.

~~(11)~~(12) "Political subdivision" means any county, incorporated city or town, public corporation, or district created pursuant to state law or other public body of the state empowered to appropriate water but not a private corporation, association, or group.

~~(12) "Slurry" means a mixture of water and insoluble material.~~

(13) "Waste" means the unreasonable loss of water through the design or negligent operation of an appropriation or water distribution facility or the

application of water to anything but a beneficial use.

(14) "Water" means all water of the state, surface and subsurface, regardless of its character or manner of occurrence, including but not limited to geothermal water, diffuse surface water, and sewage effluent.

(15) "Water division" means a drainage basin as defined in 3-7-102.

(16) "Water judge" means a judge as provided for in Title 3, chapter 7.

(17) "Water master" means a master as provided for in Title 3, chapter 7.

(18) "Well" means any artificial opening or excavation in the ground, however made, by which groundwater is sought or can be obtained or through which it flows under natural pressures or is artificially withdrawn."

Section 2. Section 85-1-204, MCA, is amended to read:

"85-1-204. Department powers over state waters. (1) The department, with the approval of the board, may sell, lease, and otherwise dispose of all waters which may be impounded under this chapter, and the water may be sold for the purpose of irrigation, development of power, watering of stock, or any other purpose. The department may also lease water under the state water leasing program established under the provisions of [section 14]. To the extent that it may be necessary to carry out this chapter and subject to a

compliance with the other provisions of this chapter, the department has full control of all the water of the state not under the exclusive control of the United States and not vested in private ownership, and it shall take such steps as may be necessary to appropriate and conserve the same for the use of the people. The authority of the department conferred by this chapter extends and applies to rights to the natural flow of the waters of this state which it may acquire, with the approval of the board, by condemnation, purchase, exchange, appropriation, or agreement.

(2) For the purpose of regulating the diversion of those waters, the department may enter upon the means and place of use of all appropriators for making surveys of respective rights and seasonal needs.

(3) The department may take into consideration the decrees of the courts of this state having jurisdiction which purport to adjudicate the waters of a stream or its tributaries, and a fair, reasonable, and equitable reconciliation shall be made between the claimants asserting rights under different decrees and between decreed rights and asserted rights of appropriation not adjudicated by any court.

(4) The department, at its discretion, may hold hearings relating to the rights of respective claimants after first giving such notice as it considers appropriate

and make findings of the date and quantity of appropriation and use of all claimants which the department will recognize and observe in diverting the waters which it owns. The department may police and distribute to the owner of the recognized appropriation the waters due him upon request and under terms agreed upon.

(5) The department, when engaged in controlling and dividing the natural flow of a stream under the authority granted by this chapter, is exercising a police power of the state, and water commissioners appointed by any court may not deprive the department of any of the waters owned or administered under agreement with respective owners. The owner of a prior right contending that the department is not recognizing and respecting the appropriation may resort to a court for the purpose of determining whether or not the rights of the claimant have been invaded, and the department shall observe the terms of the final decree.

(6) When the department impounds or acquires the right of appropriation of the waters of a stream it may divert or authorize the diversion at any point on the stream or any portion thereof when it is done without injury to a prior appropriator."

Section 3. Section 85-2-301, MCA, is amended to read:

"85-2-301. Right to appropriate. (1) After July 1, 1973, a person may not appropriate water except as provided

in this chapter. A person may only appropriate water for a beneficial use.

(2) (a) Only the department may appropriate water by permit under 85-2-311 in either of the following instances:

(i) for transport outside the following river basins:

(A) the Clark Fork River and its tributaries to its confluence with Lake Pend Oreille in Idaho;

(B) the Kootenai River and its tributaries to its confluence with Kootenay Lake in British Columbia;

(C) the St. Mary River and its tributaries to its confluence with the Oldman River in Alberta;

(D) the Little Missouri River and its tributaries to its confluence with Lake Sakakawea in North Dakota;

(E) the Missouri River and its tributaries to its confluence with the Yellowstone River in North Dakota; and

(F) the Yellowstone River to its confluence with the Missouri River in North Dakota; or

(ii) whenever water in excess of 4,000 acre-feet a year and 5.5 cubic feet per second, for any use, is to be consumed.

(b) Water for these purposes or in these amounts may be leased from the department by any person under the provisions of [section 14].

(3) A right to appropriate water may not be acquired by any other method, including by adverse use, adverse

possession, prescription, or estoppel. The method prescribed by this chapter is exclusive."

Section 4. Section 85-2-311, MCA, is amended to read:

"85-2-311. Criteria for issuance of permit. (1) Except as provided in subsections (2) ~~and--(3)~~ through (4), the department shall issue a permit if the applicant proves by substantial credible evidence that the following criteria are met:

(a) there are unappropriated waters in the source of supply:

(i) at times when the water can be put to the use proposed by the applicant;

(ii) in the amount the applicant seeks to appropriate; and

(iii) throughout the period during which the applicant seeks to appropriate, the amount requested is available;

(b) the water rights of a prior appropriator will not be adversely affected;

(c) the proposed means of diversion, construction, and operation of the appropriation works are adequate;

(d) the proposed use of water is a beneficial use;

(e) the proposed use will not interfere unreasonably with other planned uses or developments for which a permit has been issued or for which water has been reserved.

(2) ~~(a)~~ The department may not issue a permit for an

appropriation of ~~10,000~~ 4,000 or more acre-feet of water a year ~~or 5~~ and 5.5 or more cubic feet per second of water unless ~~it affirmatively finds~~ the applicant proves by clear and convincing evidence that:

~~(i)~~(a) the criteria in subsection (1) are met;

~~(ii)~~(b) ~~the applicant has proven by clear and convincing evidence that~~ the rights of a prior appropriator will not be adversely affected;

~~(iii)~~(c) the proposed appropriation is a reasonable use. Such a finding shall be based on a consideration of the following:

~~(A)~~(i) the existing demands on the state water supply, as well as projected demands such as reservations of water for future beneficial purposes, including municipal water supplies, irrigation systems, and minimum streamflows for the protection of existing water rights and aquatic life;

~~(B)~~(ii) the benefits to the applicant and the state;

~~(C) the economic feasibility of the project;~~

~~(D)~~(iii) the effects on the quantity, and quality, ~~and potability~~ of water for existing beneficial uses in the source of supply;

(iv) the availability and feasibility of using low-quality water for the purpose for which application has been made;

~~(E)~~(v) the effects on private property rights by any

creation of or contribution to saline seep; and

~~(F)~~(vi) the probable significant adverse environmental impacts of the proposed use of water as determined by the department pursuant to Title 75, chapter 1, or Title 75, chapter 20.

~~(b)--A-permit-for-an-appropriation-for-a-diversion--for-a--consumptive--use--of--10,000-or-more-acre-feet-of-water-a-year-or-15-or-more-cubic-feet-per-second-of-water-under-this-subsection-may-not-be-issued-unless-the-department-petitions-the-legislature-and-the-legislature-affirms-the-findings--of-the-department.~~

(3) (a) The state of Montana has long recognized the importance of conserving its public waters and the necessity to maintain adequate water supplies for the state's water requirements. Although the state of Montana also recognizes that, under appropriate conditions, the out-of-state transportation and use of its public waters are not in conflict with the public welfare of its citizens or the conservation of its waters, the criteria in this subsection (3) must be met before out-of-state use may occur.

(b) The department may not issue a permit for the appropriation of water for withdrawal and transportation for use outside the state unless the applicant proves by clear and convincing evidence that:

(i) depending on the volume of water diverted or

consumed, the applicable criteria and procedures of subsection (1) or (2) are met;

(ii) the proposed out-of-state use of water is not contrary to water conservation in Montana; and

(iii) the proposed out-of-state use of water is not otherwise detrimental to the public welfare of the citizens of Montana.

(c) In determining whether the applicant has proved by clear and convincing evidence that the requirements of subsections (3)(b)(ii) and (3)(b)(iii) are met, the department shall consider the following factors:

(i) whether there are present or projected water shortages within the state of Montana;

(ii) whether the water that is the subject of the application could feasibly be transported to alleviate water shortages within the state of Montana;

(iii) the supply and sources of water available to the applicant in the state where the applicant intends to use the water; and

(iv) the demands placed on the applicant's supply in the state where the applicant intends to use the water.

(d) When applying for a permit or a lease to withdraw and transport water for use outside the state, the applicant shall submit to and comply with the laws of the state of Montana governing the appropriation, lease, and use of

water.

~~(3)~~(4) An appropriation, diversion, impoundment, use, restraint, or attempted appropriation, diversion, impoundment, use, or restraint contrary to the provisions of this section is ~~null-and-void~~ invalid. No officer, agent, agency, or employee of the state may knowingly permit, aid, or assist in any manner such unauthorized appropriation, diversion, impoundment, use, or other restraint. No person or corporation may, directly or indirectly, personally or through an agent, officer, or employee, attempt to appropriate, divert, impound, use, or otherwise restrain or control waters within the boundaries of this state except in accordance with this section."

Section 5. Section 85-2-312, MCA, is amended to read:

"85-2-312. Terms of permit. (1) The department may issue a permit for less than the amount of water requested, but in no case may it issue a permit for more water than is requested or than can be beneficially used without waste for the purpose stated in the application. The department may require modification of plans and specifications for the appropriation or related diversion or construction. ~~It~~ Based upon the criteria listed in 85-2-311, the department may issue a permit subject to terms, conditions, restrictions, and limitations it considers necessary ~~to protect the rights of other appropriators~~, and it may issue temporary or

seasonal permits. A permit shall be issued subject to existing rights and any final determination of those rights made under this chapter.

(2) The department may limit the time for commencement of the appropriation works, completion of construction, and actual application of the water to the proposed beneficial use. In fixing those time limits, the department shall consider the cost and magnitude of the project, the engineering and physical features to be encountered, and, on projects designed for gradual development and gradually increased use of water, the time reasonably necessary for that gradual development and increased use. For good cause shown by the permittee, the department may in its discretion reasonably extend time limits.

(3) The original of the permit shall be sent to the permittee, and a copy shall be kept in the office of the department in Helena.

(4) The department shall provide to the county clerk and recorder of the county wherein the point of diversion or place of use is located quarterly reports and an annual summary report of all water right permits, certificates, and change approvals issued by the department within the county."

Section 6. Section 85-2-124, MCA, is amended to read:

"85-2-124. Fees for environmental impact statements.

(1) Whenever the department determines that the filing of an application (or a combination of applications) for a permit or approval under this chapter requires the preparation of an environmental impact statement as prescribed by the Montana Environmental Policy Act and the application (or combination of applications) involves the use of ~~10,000~~ 4,000 or more acre-feet per year ~~or 15~~ and 5.5 or more cubic feet per second of water, the applicant shall pay to the department the fee prescribed in this section. The department shall notify the applicant in writing within 90 days of receipt of a correct and complete application (or a combination of applications) if it determines that an environmental impact statement and fee is required.

(2) Upon notification by the department under subsection (1), the applicant shall pay a fee based upon the estimated cost of constructing, repairing, or changing the appropriation and diversion facilities as herein provided. The maximum fee that shall be paid to the department may not exceed the fees set forth in the following declining scale: 2% of the estimated cost up to $1 million; plus 1% of the estimated cost over $1 million and up to $20 million; plus 1/2 of 1% of the estimated cost over $20 million and up to $100 million; plus 1/4 of 1% of the estimated cost over $100 million and up to $300 million; plus 1/8 of 1% of the estimated cost over $300 million. The fee shall be

deposited in the state special revenue fund to be used by the department only to comply with the Montana Environmental Policy Act in connection with the application(s). Any amounts paid by the applicant but not actually expended by the department shall be refunded to the applicant.

(3) The department and the applicant may determine by agreement the estimated cost of any facility for purposes of computing the amount of the fee to be paid to the department by the applicant. The department may contract with an applicant for:

(a) the development of information by the applicant or a third party on behalf of the department and the applicant concerning the environmental impact of any proposed activity under an application;

(b) the division of responsibility between the department and an applicant for supervision over, control of, and payment for the development of information by the applicant or a third party on behalf of the department and the applicant under any such contract or contracts;

(c) the use or nonuse of a fee or any part thereof paid to the department by an applicant.

(4) Any payments made to the department or any third party by an applicant under any such contract or contracts shall be credited against any fee the applicant must pay hereunder. The department and the applicant may agree on

additional credits against the fee for environmental work performed by the applicant at the applicant's own expense.

(5) No fee as prescribed by this section may be assessed against an applicant for a permit or approval if the applicant has also filed an application for a certificate of environmental compatibility or public need pursuant to the Montana Major Facility Siting Act and the appropriation or use of water involved in the application(s) for permit or approval has been or will be studied by the department pursuant to that act.

(6) This section shall apply to all applications, pending or hereinafter filed, for which the department has not, as of April 9, 1975, commenced writing an environmental impact statement. This section shall not apply to any application, the fee for which would not exceed $2,500.

(7) Failure to submit the fee as required by this section shall void the application(s).

(8) The department may in its discretion rely upon the environmental studies, investigations, reports, and assessments made by any other state agency or any person, including any applicant, in the preparation of its environmental impact statement."

Section 7. Section 85-2-402, MCA, is amended to read:

"85-2-402. Changes in appropriation rights. ~~(1) An appropriator may not change the place of diversion, place of~~

use, purpose of use, or place of storage except as permitted under this section and approved by the department.

(2) The department shall approve the proposed change if it determines that the proposed change will not adversely affect the rights of other persons. If the department determines that the proposed change might adversely affect the rights of other persons, notice of the proposed change shall be given in accordance with 85-2-307. If the department determines that an objection filed by a person whose rights may be affected states a valid objection to the proposed change, the department shall hold a hearing thereon prior to its approval or denial of the proposed change. Objections shall meet the requirements of 85-2-308(2), and hearings shall be held in accordance with 85-2-309.

(3) An appropriator of more than 15 cubic feet per second may not change the purpose of use of an appropriation right from an agricultural or irrigation use to an industrial use.

(4) The department may approve a change subject to such terms, conditions, restrictions, and limitations it considers necessary to protect the rights of other appropriators, including limitations on the time for completion of the change.

(5) If a change is not completed as approved by the department or if the terms, conditions, restrictions, and

~~limitations of the change approval are not complied with, the department may, after notice and opportunity for hearing, require the appropriator to show cause why the change approval should not be modified or revoked. If the appropriator fails to show sufficient cause, the department may modify or revoke the change approval.~~

~~(6) Without obtaining prior approval from the department, an appropriater may not sever all or any part of an appropriation right from the land to which it is appurtenant, sell the appropriation right for other purposes or to other lands, or make the appropriation right appurtenant to other lands. The department shall approve the proposed change if it determines that the proposed change will not adversely affect the water rights of other persons. If the department determines that the proposed change might adversely affect the water rights of other persons, notice of the proposed change must be given in accordance with 85-2-307. If the department then determines that an objection filed by a person whose water rights may be affected states a valid objection to the proposed change, the department shall hold a hearing thereon prior to its approval or denial of the proposed change. Objections must meet the requirements of 85-2-308, and hearings must be held in accordance with 85-2-309.~~ (1) An appropriator may not make a change in an appropriation right except as permitted

under this section and with the approval of the department or, if applicable, of the legislature.

(2) Except as provided in subsections (3) through (5), the department shall approve a change in appropriation right if the appropriator proves by substantial credible evidence that the following criteria are met:

(a) The proposed use will not adversely affect the water rights of other persons or other planned uses or developments for which a permit has been issued or for which water has been reserved.

(b) The proposed means of diversion, construction, and operation of the appropriation works are adequate.

(c) The proposed use of water is a beneficial use.

(3) The department may not approve a change in purpose of use or place of use of an appropriation of 4,000 or more acre-feet of water a year and 5.5 or more cubic feet per second of water unless the appropriator proves by clear and convincing evidence that:

(a) the criteria in subsection (2) are met;

(b) the proposed change is a reasonable use. A finding of reasonable use must be based on a consideration of:

(i) the existing demands on the state water supply, as well as projected demands of water for future beneficial purposes, including municipal water supplies, irrigation

systems, and minimum streamflows for the protection of existing water rights and aquatic life;

(ii) the benefits to the applicant and the state;

(iii) the effects on the quantity and quality of water for existing uses in the source of supply;

(iv) the availability and feasibility of using low-quality water for the purpose for which application has been made;

(v) the effects on private property rights by any creation of or contribution to saline seep; and

(vi) the probable significant adverse environmental impacts of the proposed use of water as determined by the department pursuant to Title 75, chapter 1, or Title 75, chapter 20.

(4) The department may not approve a change in purpose of use or place of use for a diversion that results in 4,000 or more acre-feet of water a year and 5.5 or more cubic feet per second of water being consumed unless:

(a) the applicant proves by clear and convincing evidence and the department finds that the criteria in subsections (2) and (3) are met; and

(b) the department then petitions the legislature and the legislature affirms the decision of the department after a public hearing.

(5) (a) The state of Montana has long recognized the

importance of conserving its public waters and the necessity to maintain adequate water supplies for the state's water requirements. Although the state of Montana also recognizes that, under appropriate conditions, the out-of-state transportation and use of its public waters are not in conflict with the public welfare of its citizens or the conservation of its waters, the following criteria must be met before out-of-state use may occur:

(b) The department and, if applicable, the legislature may not approve a change in appropriation right for the withdrawal and transportation of appropriated water for use outside the state unless the appropriator proves by clear and convincing evidence and, if applicable, the legislature approves after a public hearing that:

(i) depending on the volume of water diverted or consumed, the applicable criteria and procedures of subsection (2) or (3) are met;

(ii) the proposed out-of-state use of water is not contrary to water conservation in Montana; and

(iii) the proposed out-of-state use of water is not otherwise detrimental to the public welfare of the citizens of Montana.

(c) In determining whether the appropriator has proved by clear and convincing evidence that the requirements of subsections (5)(b)(ii) and (5)(b)(iii) will be met, the

department and, if applicable, the legislature shall consider the following factors:

(i) whether there are present or projected water shortages within the state of Montana;

(ii) whether the water that is the subject of the proposed change in appropriation might feasibly be transported to alleviate water shortages within the state of Montana;

(iii) the supply and sources of water available to the applicant in the state where the applicant intends to use the water; and

(iv) the demands placed on the applicant's supply in the state where the applicant intends to use the water.

(d) When applying for a change in appropriation right to withdraw and transport water for use outside the state, the applicant shall submit to and comply with the laws of the state of Montana governing the appropriation and use of water.

(6) For any application for a change in appropriation right involving 4,000 or more acre-feet of water a year and 5.5 or more cubic feet per second of water, the department shall give notice of the proposed change in accordance with 85-2-307 and shall hold a hearing in accordance with 85-2-309 prior to its approval or denial of the proposed change. The department shall provide notice and may hold a

hearing upon any other proposed change if it determines that such a change might adversely affect the rights of other persons.

(7) The department or the legislature, if applicable, may approve a change subject to such terms, conditions, restrictions, and limitations as it considers necessary to protect the rights of other persons and satisfy the criteria of this section, including limitations on the time for completion of the change.

(8) If a change is not completed as approved by the department or legislature or if the terms, conditions, restrictions, and limitations of the change approval are not complied with, the department may, after notice and opportunity for hearing, require the appropriator to show cause why the change approval should not be modified or revoked. If the appropriator fails to show sufficient cause, the department may modify or revoke the change approval.

~~(7)~~(9) The original of a change approval issued by the department must be sent to the applicant, and a duplicate must be kept in the office of the department in Helena.

~~(8)~~(10) A person holding an issued permit or change approval that nas not been perfected may change the place of diversion, place of use, purpose of use, or place of storage by filing an application for change pursuant to this

section.

(11) A change in appropriation right contrary to the provisions of this section is invalid. No officer, agent, agency, or employee of the state may knowingly permit, aid, or assist in any manner such unauthorized change in appropriation right. No person or corporation may, directly or indirectly, personally or through an agent, officer, or employee, attempt to change an appropriation right except in accordance with this section."

Section 8. Section 75-20-104, MCA, is amended to read:

"75-20-104. Definitions. In this chapter, unless the context requires otherwise, the following definitions apply:

(1) "Addition thereto" means the installation of new machinery and equipment which would significantly change the conditions under which the facility is operated.

(2) "Application" means an application for a certificate submitted in accordance with this chapter and the rules adopted hereunder.

(3) "Associated facilities" includes but is not limited to transportation links of any kind, aqueducts, diversion dams, transmission substations, storage ponds, reservoirs, and any other device or equipment associated with the production or delivery of the energy form or product produced by a facility, except that the term does not include a facility.

(4) "Board" means the board of natural resources and conservation provided for in 2-15-3302.

(5) "Board of health" means the board of health and environmental sciences provided for in 2-15-2104.

(6) "Certificate" means the certificate of environmental compatibility and public need issued by the board under this chapter that is required for the construction or operation of a facility.

(7) "Commence to construct" means:

(a) any clearing of land, excavation, construction, or other action that would affect the environment of the site or route of a facility but does not mean changes needed for temporary use of sites or routes for nonutility purposes or uses in securing geological data, including necessary borings to ascertain foundation conditions;

(b) the fracturing of underground formations by any means if such activity is related to the possible future development of a gasification facility or a facility employing geothermal resources but does not include the gathering of geological data by boring of test holes or other underground exploration, investigation, or experimentation;

(c) the commencement of eminent domain proceedings under Title 70, chapter 30, for land or rights-of-way upon or over which a facility may be constructed;

(d) the relocation or upgrading of an existing facility defined by (b) or (c) of subsection (10), including upgrading to a design capacity covered by subsection (10)(b), except that the term does not include normal maintenance or repair of an existing facility.

(8) "Department" means the department of natural resources and conservation provided for in Title 2, chapter 15, part 33.

(9) "Department of health" means the department of health and environmental sciences provided for in Title 2, chapter 15, part 21.

(10) "Facility" means:

(a) except for crude oil and natural gas refineries, and facilities and associated facilities designed for or capable of producing, gathering, processing, transmitting, transporting, or distributing crude oil or natural gas, and those facilities subject to The Montana Strip and Underground Mine Reclamation Act, each plant, unit, or other facility and associated facilities designed for or capable of:

(i) generating 50 megawatts of electricity or more or any addition thereto (except pollution control facilities approved by the department of health and environmental sciences added to an existing plant) having an estimated cost in excess of $10 million;

(ii) producing 25 million cubic feet or more of gas derived from coal per day or any addition thereto having an estimated cost in excess of $10 million;

(iii) producing 25,000 barrels of liquid hydrocarbon products per day or more or any addition thereto having an estimated cost in excess of $10 million;

(iv) enriching uranium minerals or any addition thereto having an estimated cost in excess of $10 million; or

(v) utilizing or converting 500,000 tons of coal per year or more or any addition thereto having an estimated cost in excess of $10 million;

(b) each electric transmission line and associated facilities of a design capacity of more than 69 kilovolts, except that the term does not include an electric transmission line and associated facilities of a design capacity of 230 kilovolts or less and 10 miles or less in length;

(c) each pipeline and associated facilities designed for or capable of transporting gas (except for natural gas), water, or liquid hydrocarbon products from or to a facility located within or without this state of the size indicated in subsection (10)(a) of this section;

(d) each pipeline greater than 17 inches in diameter and 30 miles in length, and associated facilities;

~~(d)~~(e) any use of geothermal resources, including the

use of underground space in existence or to be created, for the creation, use, or conversion of energy, designed for or capable of producing geothermally derived power equivalent to 25 million Btu per hour or more or any addition thereto having an estimated cost in excess of $750,000;

~~(e)~~(f) any underground in situ gasification of coal.

(11) "Person" means any individual, group, firm, partnership, corporation, cooperative, association, government subdivision, government agency, local government, or other organization or entity.

(12) "Transmission substation" means any structure, device, or equipment assemblage, commonly located and designed for voltage regulation, circuit protection, or switching necessary for the construction or operation of a proposed transmission line.

(13) "Utility" means any person engaged in any aspect of the production, storage, sale, delivery, or furnishing of heat, electricity, gas, hydrocarbon products, or energy in any form for ultimate public use."

Section 9. Section 75-20-216, MCA, is amended to read:

"75-20-216. Study, evaluation, and report on proposed facility -- assistance by other agencies. (1) After receipt of an application, the department and department of health shall within 90 days notify the applicant in writing that:

(a) the application is in compliance and is accepted

as complete; or

(b) the application is not in compliance and list the deficiencies therein; and upon correction of these deficiencies and resubmission by the applicant, the department and department of health shall within 30 days notify the applicant in writing that the application is in compliance and is accepted as complete.

(2) Upon receipt of an application complying with 75-20-211 through 75-20-215, and this section, the department shall commence an intensive study and evaluation of the proposed facility and its effects, considering all applicable criteria listed in 75-20-301 and 75-20-503 and the department of health shall commence a study to enable it or the board of health to issue a decision, opinion, order, certification, or permit as provided in subsection (3). The department and department of health shall use, to the extent they consider applicable, valid and useful existing studies and reports submitted by the applicant or compiled by a state or federal agency.

(3) The department of health shall within 1 year following the date of acceptance of an application and the board of health or department of health, if applicable, within an additional 6 months issue any decision, opinion, order, certification, or permit required under the laws administered by the department of health or the board of

health and this chapter. The department of health and the board of health shall determine compliance with all standards, permit requirements, and implementation plans under their jurisdiction for the primary and reasonable alternate locations in their decision, opinion, order, certification, or permit. The decision, opinion, order, certification, or permit, with or without conditions, is conclusive on all matters that the department of health and board of health administer, and any of the criteria specified in subsections (2) through (7) of 75-20-503 that are a part of the determinations made under the laws administered by the department of health and the board of health. Although the decision, opinion, order, certification, or permit issued under this subsection is conclusive, the board retains authority to make the determination required under 75-20-301(2)(c). The decision, opinion, order, certification, or permit of the department of health or the board of health satisfies the review requirements by those agencies and shall be acceptable in lieu of an environmental impact statement under the Montana Environmental Policy Act. A copy of the decision, opinion, order, certification, or permit shall be served upon the department and the board and shall be utilized as part of their final site selection process. Prior to the issuance of a preliminary decision by the department of health and

pursuant to rules adopted by the board of health, the department of health shall provide an opportunity for public review and comment.

(4) Within 22 months following acceptance of an application for a facility as defined in (a) and ~~(d)~~(e) of 75-20-104(10) and for a facility as defined in (b) ~~and (c)~~ through (d) of 75-20-104(10) which is more than 30 miles in length and within 1 year for a facility as defined in (b) ~~and (c)~~ through (d) of 75-20-104(10) which is 30 miles or less in length, the department shall make a report to the board which shall contain the department's studies, evaluations, recommendations, other pertinent documents resulting from its study and evaluation, and an environmental impact statement or analysis prepared pursuant to the Montana Environmental Policy Act, if any. If the application is for a combination of two or more facilities, the department shall make its report to the board within the greater of the lengths of time provided for in this subsection for either of the facilities.

(5) The departments of highways; commerce; fish, wildlife, and parks; state lands; revenue; and public service regulation shall report to the department information relating to the impact of the proposed site on each department's area of expertise. The report may include opinions as to the advisability of granting, denying, or

modifying the certificate. The department shall allocate funds obtained from filing fees to the departments making reports to reimburse them for the costs of compiling information and issuing the required report."

Section 10. Section 75-20-218, MCA, is amended to read:

"75-20-218. Hearing date -- location -- department to act as staff -- hearings to be held jointly. (1) Upon receipt of the department's report submitted under 75-20-216, the board shall set a date for a hearing to begin not more than 120 days after the receipt. ~~Except--for--those hearings--involving-applications-submitted-for-facilities-as defined-in--(b)--and--(c)--of--75-20-104(10),--certification~~ Certification hearings shall be conducted by the board in the county seat of Lewis and Clark County or the county in which the facility or the greater portion thereof is to be located.

(2) Except as provided in 75-20-221(2), the department shall act as the staff for the board throughout the decisionmaking process and the board may request the department to present testimony or cross-examine witnesses as the board considers necessary and appropriate.

(3) At the request of the applicant, the department of health and the board of health shall hold any required permit hearings required under laws administered by those

agencies in conjunction with the board certification hearing. In such a conjunctive hearing the time periods established for reviewing an application and for issuing a decision on certification of a proposed facility under this chapter supersede the time periods specified in other laws administered by the department of health and the board of health."

Section 11. Section 75-20-303, MCA, is amended to read:

"75-20-303. Opinion issued with decision -- contents. (1) In rendering a decision on an application for a certificate, the board shall issue an opinion stating its reasons for the action taken.

(2) If the board has found that any regional or local law or regulation which would be otherwise applicable is unreasonably restrictive pursuant to 75-20-301(2)(f), it shall state in its opinion the reasons therefor.

(3) Any certificate issued by the board shall include the following:

(a) an environmental evaluation statement related to the facility being certified. The statement shall include but not be limited to analysis of the following information:

(i) the environmental impact of the proposed facility;

(ii) any adverse environmental effects which cannot be avoided by issuance of the certificate;

(iii) problems and objections raised by other federal and state agencies and interested groups;

(iv) alternatives to the proposed facility;

(v) a plan for monitoring environmental effects of the proposed facility; and

(vi) a time limit as provided in subsection (4), during which construction of the facility must be completed;

(b) a statement signed by the applicant showing agreement to comply with the requirements of this chapter and the conditions of the certificate.

(4) The board shall issue as part of the certificate the following time limits during which construction of a facility must be completed:

(a) For a facility as defined in (b), ~~or~~ (c), or (d) of 75-20-104(10) that is more than 30 miles in length, the time limit is 10 years.

(b) For a facility as defined in (b), ~~or~~ (c), or (d) of 75-20-104(10) that is 30 miles or less in length, the time limit is 5 years.

(c) The time limit shall be extended for periods of 2 years each upon a showing by the applicant to the board that a good faith effort is being undertaken to complete construction. Under this subsection, a good faith effort to complete construction includes the process of acquiring any necessary state or federal permit or certificate for the

facility and the process of judicial review of any such permit or certificate.

(5) The provisions of subsection (4) apply to any facility for which a certificate has not been issued or for which construction is yet to be commenced."

Section 12. Section 75-20-304, MCA, is amended to read:

"75-20-304. Waiver of provisions of certification proceedings. (1) The board may waive compliance with any of the provisions of 75-20-216 through 75-20-222, 75-20-501, and this part if the applicant makes a clear and convincing showing to the board at a public hearing that an immediate, urgent need for a facility exists and that the applicant did not have knowledge that the need for the facility existed sufficiently in advance to fully comply with the provisions of 75-20-216 through 75-20-222, 75-20-501, and this part.

(2) The board may waive compliance with any of the provisions of this chapter upon receipt of notice by a utility or person subject to this chapter that a facility or associated facility has been damaged or destroyed as a result of fire, flood, or other natural disaster or as the result of insurrection, war, or other civil disorder and there exists an immediate need for construction of a new facility or associated facility or the relocation of a previously existing facility or associated facility in order

to promote the public welfare.

(3) The board shall waive compliance with the requirements of subsections (2)(c), (3)(b), and (3)(c) of 75-20-301 and 75-20-501(5) and the requirements of subsections (1)(a)(iv) and (v) of 75-20-211, 75-20-216(3), and 75-20-303(3)(a)(iv) relating to consideration of alternative sites if the applicant makes a clear and convincing showing to the board at a public hearing that:

(a) a proposed facility will be constructed in a county where a single employer within the county has permanently curtailed or ceased operations causing a loss of 250 or more permanent jobs within 2 years at the employer's operations within the preceding 10-year period;

(b) the county and municipal governing bodies in whose jurisdiction the facility is proposed to be located support by resolution such a waiver;

(c) the proposed facility will be constructed within a 15-mile radius of the operations that have ceased or been curtailed; and

(d) the proposed facility will have a beneficial effect on the economy of the county in which the facility is proposed to be located.

(4) The waiver provided for in subsection (3) applies only to permanent job losses by a single employer. The waiver provided for in subsection (3) does not apply to jobs

of a temporary or seasonal nature, including but not limited to construction jobs, or job losses during labor disputes.

(5) The waiver provided for in subsection (3) does not apply to consideration of alternatives or minimum adverse environmental impact for a facility defined in subsections (10)(b), (c), (d), (e), or ~~(e)~~ (f) of 75-20-104, for an associated facility defined in subsection (3) of 75-20-104, or for any portion of or process in a facility defined in subsection (10)(a) of 75-20-104 to the extent that the process or portion of the facility is not subject to a permit issued by the department of health or board of health.

(6) The applicant shall pay all expenses required to process and conduct a hearing on a waiver request under subsection (3). However, any payments made under this subsection shall be credited toward the fee paid under 75-20-215 to the extent the data or evidence presented at the hearing or the decision of the board under subsection (3) can be used in making a certification decision under this chapter.

(7) The board may grant only one waiver under subsections (3) and (4) for each permanent loss of jobs as defined in subsection (3)(a)."

Section 13. Section 75-20-1202, MCA, is amended to read:

"75-20-1202. Definitions. As used in this part and 75-20-201 through 75-20-203, the following definitions apply:

(1) (a) "Nuclear facility" means each plant, unit, or other facility designed for or capable of:

(i) generating 50 megawatts of electricity or more by means of nuclear fission;

(ii) converting, enriching, fabricating, or reprocessing uranium minerals or nuclear fuels; or

(iii) storing or disposing of radioactive wastes or materials from a nuclear facility.

(b) "Nuclear facility" does not include any small-scale facility used solely for educational, research, or medical purposes not connected with the commercial generation of energy.

(2) "Facility", as defined in 75-20-104~~(7)~~(10), is further defined to include any nuclear facility as defined in subsection (1)(a) of this section."

NEW SECTION. Section 14. Water leasing program. (1) There is a water leasing program administered by the department on behalf of the state of Montana.

(2) The department may acquire rights to water needed for leasing under this program through appropriation of water in its own name or by agreement with or purchase from another holder of water rights.

(3) Water for leasing under the water leasing program must be obtained from the following sources:

(a) any existing or future reservoir in a basin concerning which a temporary preliminary decree, a preliminary decree under 85-2-231, or a final decree under 85-2-234 has been entered;

(b) Fort Peck Reservoir, if an agreement between the department and the federal government concerning the acquisition of water and the sharing of revenues with the state is in effect;

(c) Tiber, Canyon Ferry, Hungry Horse, or Yellowtail Reservoirs if and for so long as there is an agreement between the department and the federal government concerning the acquisition of water and sharing of revenues with the state from one or more of these reservoirs; and

(d) any other existing or future federal reservoir:

(i) located in a basin concerning which a temporary preliminary decree, a preliminary decree under 85-2-231, or a final decree under 85-2-234 has been entered; and

(ii) for which and for so long as there is an agreement between the department and the federal government concerning the acquisition of water and the sharing of revenues with the state.

(4) Water may be leased for any beneficial use. The amount of water that can be leased under this program for

all beneficial uses shall not exceed 50,000 acre-feet.

(5) The term of any lease may not exceed 50 years. A term may be extended up to another 50 years if the department again determines the desirability of leasing by applying the considerations set forth in subsection (7). In making such a redetermination, the department may require the completion of an environmental impact statement in accordance with subsection (6).

(6) The department shall require the completion of an environmental impact statement under the provisions of Title 75, chapter 1, for lease applications that would result in the consumption of 4,000 acre-feet a year or more and 5.5 cubic feet per second or more of water and for any other application for which an environmental impact statement is required by law. The department shall require the completion of an environmental impact statement whenever the cumulative effect of more than one application for a lease would constitute a probable significant environmental impact.

(7) Upon application by any person to lease water, the department shall make an initial determination of whether it is desirable for the department to lease water to the applicant. Such a determination of desirability shall be made solely on the following considerations:

(a) the content of the environmental impact statement,

if required;

(b) whether there is sufficient water available under the water leasing program; and

(c) whether the criteria, except as to legislative approval, set forth in 85-2-311 have been satisfied.

(8) The department shall for any agreement require commercially reasonable terms and conditions, which may include the requirement that up to 25% of the water to be leased be made available to a potential user for any beneficial use upon payment by such user of the costs of tapping into and removing water from the applicant's project. The department may differentiate in pricing, depending on the proposed beneficial use of the water.

(9) The lease of water or the use of water under a lease does not constitute a permit as provided in 85-2-102 and does not establish a right to appropriate water within the meaning of Title 85, chapter 2, part 3.

(10) For purposes of the water leasing program established in this section, it is the intent of the legislature that the state act as a proprietor.

Section 15. Section 85-1-205, MCA, is amended to read:

"85-1-205. Acquisition of water in federal reservoirs. ~~(1)~~ The department may acquire water or water storage by purchase option or agreement with the federal government from any federal reservoir for the purpose of sale, rent, or

distribution for ~~industrial and other uses~~ any beneficial use. In such cases, the department is not required to construct any diversion or appropriation facilities or works, and it may sell, rent, or distribute such water at such rates and under such terms and conditions as it considers appropriate~~, except as provided in subsection (2)~~.

~~(2) Until a final decree has been issued pursuant to 85-2-234 concerning the waters in a federal reservoir, the department may sell, rent, or distribute such water only after a permit has been issued to an applicant for purchase, rent, or distribution of water in accordance with part 3 of this chapter.~~"

Section 16. Section 85-2-316, MCA, is amended to read:

"85-2-316. Reservation of waters. (1) The state or any political subdivision or agency thereof or the United States or any agency thereof may apply to the board to reserve waters for existing or future beneficial uses or to maintain a minimum flow, level, or quality of water throughout the year or at such periods or for such length of time as the board designates.

(2) Water may be reserved only for existing or future beneficial uses in the following river basins:

(a) the Clark Fork River and its tributaries to its confluence with Lake Pend Oreille in Idaho;

(b) the Kootenai River and its tributaries to its

confluence with Kootenay Lake in British Columbia;

(c) the St. Mary River and its tributaries to its confluence with the Oldman River in Alberta;

(d) the Little Missouri River and its tributaries to its confluence with Lake Sakakawea in North Dakota;

(e) the Missouri River and its tributaries to its confluence with the Yellowstone River in North Dakota; and

(f) the Yellowstone River to its confluence with the Missouri River in North Dakota.

~~(2)~~(3) Upon receiving an application, the department shall proceed in accordance with 85-2-307 through 85-2-309. After the hearing provided in 85-2-309, the board shall decide whether to reserve the water for the applicant. The department's costs of giving notice, holding the hearing, conducting investigations, and making records incurred in acting upon the application to reserve water, except the cost of salaries of the department's personnel, shall be paid by the applicant. In addition, a reasonable proportion of the department's cost of preparing an environmental impact statement shall be paid by the applicant unless waived by the department upon a showing of good cause by the applicant.

~~(3)~~(4) (a) The board may not adopt an order reserving water unless the applicant establishes to the satisfaction of the board:

~~(a)~~(i) the purpose of the reservation;

~~(b)~~(ii) the need for the reservation;

~~(c)~~(iii) the amount of water necessary for the purpose of the reservation;

~~(d)~~(iv) that the reservation is in the public interest.

(b) In determining the public interest under subsection (4)(a)(iv), the board may not adopt an order reserving water for withdrawal and transport for use outside the state unless the applicant proves by clear and convincing evidence that:

(i) the proposed out-of-state use of water is not contrary to water conservation in Montana; and

(ii) the proposed out-of-state use of water is not otherwise detrimental to the public welfare of the citizens of Montana.

(c) In determining whether the applicant has proved by clear and convincing evidence that the requirements of subsections (4)(b)(i) and (4)(b)(ii) are met, the board shall consider the following factors:

(i) whether there are present or projected water shortages within the state of Montana;

(ii) whether the water that is the subject of the application could feasibly be transported to alleviate water shortages within the state of Montana;

(iii) the supply and sources of water available to the

applicant in the state where the applicant intends to use the water; and

(iv) the demands placed on the applicant's supply in the state where the applicant intends to use the water.

(d) When applying for a reservation to withdraw and transport water for use outside the state, the applicant shall submit to and comply with the laws of the state of Montana governing the appropriation, lease, use, and reservation of water.

~~(4)~~(5) If the purpose of the reservation requires construction of a storage or diversion facility, the applicant shall establish to the satisfaction of the board that there will be progress toward completion of the facility and accomplishment of the purpose with reasonable diligence in accordance with an established plan.

~~(5)~~(6) The board shall limit any reservations after May 9, 1979, for maintenance of minimum flow, level, or quality of water that it awards at any point on a stream or river to a maximum of 50% of the average annual flow of record on gauged streams. Ungauged streams can be allocated at the discretion of the board.

~~(6)~~(7) After the adoption of an order reserving waters, the department may reject an application and refuse a permit for the appropriation of reserved waters or may, with the approval of the board, issue the permit subject to

such terms and conditions it considers necessary for the protection of the objectives of the reservation.

~~(7)~~(8) Any person desiring to use water reserved to a conservation district for agricultural purposes shall make application for such use with the district, and the district upon approval of the application must inform the department of the approved use. The department shall maintain records of all uses of water reserved to conservation districts and be responsible, when requested by the districts, for rendering technical and administrative assistance within the department's staffing and budgeting limitations in the preparation and processing of such applications for the conservation districts. The department shall, within its staffing and budgeting limitations, complete any feasibility study requested by the districts within 12 months of the time the request was made. The board shall extend the time allowed to develop a plan identifying projects for utilizing a district's reservation so long as the conservation district makes a good faith effort, within its staffing and budget limitations, to develop a plan.

~~(8)~~(9) A reservation under this section shall date from the date the order reserving the water is adopted by the board and shall not adversely affect any rights in existence at that time.

~~(9)~~(10) The board shall, periodically but at least once

every 10 years, review existing reservations to ensure that the objectives of the reservation are being met. Where the objectives of the reservation are not being met, the board may extend, revoke, or modify the reservation.

~~(10)~~(11) The board may modify an existing or future order originally adopted to reserve water for the purpose of maintaining minimum flow, level, or quality of water, so as to reallocate such reservation or portion thereof to an applicant who is a qualified reservant under this section. Reallocation of reserved water may be made by the board following notice and hearing wherein the board finds that all or part of the reservation is not required for its purpose and that the need for the reallocation has been shown by the applicant to outweigh the need shown by the original reservant. Reallocation of reserved water shall not adversely affect the priority date of the reservation, and the reservation shall retain its priority date despite reallocation to a different entity for a different use. The board may not reallocate water reserved under this section on any stream or river more frequently than once every 5 years.

~~(11)~~(12) Nothing in this section vests the board with the authority to alter a water right that is not a reservation.

(13) The department shall undertake a program to

educate the public, other state agencies, and political subdivisions of the state as to the benefits of the reservation process and the procedures to be followed to secure the reservation of water. The department shall provide technical assistance to other state agencies and political subdivisions in applying for reservations under this section.

(14) Water reserved under this section is not subject to the state water leasing program established under [section 14]."

NEW SECTION. Section 17. Reservations within Missouri River basin. (1) The state or any agency or political subdivision thereof or the United States or any agency thereof that desires to apply for a reservation of water in the Missouri River basin shall file a claim pursuant to 85-2-316 no later than July 1, 1987.

(2) The department shall provide technical and financial assistance to other state agencies and political subdivisions in applying for reservations within the Missouri River basin.

(3) Before December 31, 1989, the board shall make a final determination in accordance with 85-2-316 on all applications filed before July 1, 1987, for reservations of water in the Missouri River basin.

(4) Water reservations approved by the board under

this section have a priority date of July 1, 1985. The board shall by order establish the relative priority of applications approved under this section.

Section 18. Section 85-2-112, MCA, is amended to read:

"85-2-112. Department duties. The department shall:

(1) enforce and administer this chapter and rules adopted by the board under 85-2-113, subject to the powers and duties of the supreme court under 3-7-204;

(2) prescribe procedures, forms, and requirements for applications, permits, certificates, claims of existing rights, and proceedings under this chapter and prescribe the information to be contained in any application, claim of existing right, or other document to be filed with the department under this chapter not inconsistent with the requirements of this chapter;

(3) establish and keep in its Helena office a centralized record system of all existing rights and a public record of permits, certificates, claims of existing rights, applications, and other documents filed in its office under this chapter;

(4) in cooperation with other state agencies, institutions, colleges, and universities, establish and maintain a centralized and efficient water resources data management system sufficient to make available and readily accessible, in a usable format, to state agencies and other

interested persons, information on the state's water resources, out-of-state water resources that affect the state, existing and potential uses, and existing and potential demand. All other state agencies, institutions, and colleges and universities shall cooperate with the department in the development and maintenance of this system.

~~(4)~~(5) cooperate with, assist, advise, and coordinate plans and activities with the federal, state, and local agencies in matters relating to this chapter;

~~(5)~~(6) upon request by any person, cooperate with, assist, and advise that person in matters pertaining to measuring water or filing claims of existing rights with a district court under this chapter;

~~(6)~~(7) adopt rules necessary to reject, modify, or condition permit applications in highly appropriated basins or subbasins as provided in 85-2-319."

Section 19. Section 85-1-203, MCA, is amended to read:

"85-1-203. State water plan. (1) The department shall gather from any source reliable information relating to Montana's water resources and prepare therefrom a continuing comprehensive inventory of the water resources of the state. In preparing this inventory, the department may conduct studies; adopt studies made by other competent water resource groups, including federal, regional, state, or

private agencies; perform research or employ other competent agencies to perform research on a contract basis; and hold public hearings in affected areas at which all interested parties shall be given an opportunity to appear.

(2) The department shall formulate and, with the approval of the board, adopt and from time to time amend, extend, or add to a comprehensive, coordinated multiple-use water resources plan known as the "state water plan". The state water plan may be formulated and adopted in sections, these sections corresponding with hydrologic divisions of the state. The state water plan shall set out a progressive program for the conservation, development, and utilization of the state's water resources and propose the most effective means by which these water resources may be applied for the benefit of the people, with due consideration of alternative uses and combinations of uses. Before adoption of the state water plan or any section thereof, the department shall hold public hearings in the state or in an area of the state encompassed by a section thereof if adoption of a section is proposed. Notice of the hearing or hearings shall be published for 2 consecutive weeks in a newspaper of general county circulation in each county encompassed by the proposed plan or section thereof at least 30 days prior to the hearing.

(3) The department shall submit to the water policy

committee established in [section 21] and to each general session of the legislature the state water plan or any section thereof or amendments, additions, or revisions thereto which the department has formulated and adopted.

(4) The department shall prepare a continuing inventory of the groundwater resources of the state. The groundwater inventory shall be included in the comprehensive water resources inventory described in subsection (1) above but shall be a separate component thereof.

(5) The department shall publish the comprehensive inventory, the state water plan, the groundwater inventory, or any part of each, and the department may assess and collect a reasonable charge for these publications.

(6) In developing and revising the state water plan as provided in this section, the department shall consult with the water policy committee established in [section 21] and solicit the advice of the committee in carrying out its duties under this section."

Section 20. Section 85-1-621, MCA, is amended to read:

"85-1-621. Report to the legislature. The department shall prepare a biennial report to the legislature describing the status of the water development program. The report must describe ongoing projects and activities and those which have been completed during the biennium. The report must identify and rank in order of priority the

projects for which the department desires to seek congressional authorization and funding and the efforts the department will undertake in attempting to secure such authorization and funding. The report must also describe proposed projects and activities for the coming biennium and recommendations for necessary appropriations. A copy of the report shall be submitted to the president of the senate and the speaker of the house, to the members of the water policy committee established in [section 21], and to such other members of the legislature as may request a copy."

NEW SECTION. Section 21. Water policy committee. (1) There is a permanent water policy committee of the legislature. The committee consists of eight members. The senate committee on committees and the speaker of the house of representatives shall each appoint four members on a bipartisan basis. The committee shall elect its chairman and vice-chairman. The committee shall meet as often as necessary, including during the interim between sessions, to perform the duties specified within this section.

(2) On a continuing basis, the committee shall:

(a) advise the legislature on the adequacy of the state's water policy and of important state, regional, national, and international developments which affect Montana's water resources;

(b) oversee the policies and activities of the

department of natural resources and conservation, other state executive agencies, and other state institutions, as they affect the water resources of the state; and

(c) communicate with the public on matters of water policy as well as the water resources of the state.

(3) On a regular basis, the committee shall:

(a) analyze and comment on the state water plan required by 85-1-203, when filed by the department;

(b) analyze and comment on the report of the status of the state's water development program required by 85-1-621, when filed by the department;

(c) analyze and comment on water-related research undertaken by any state agency, institution, college, or university;

(d) analyze, verify, and comment on the adequacy of and information contained in the water resources data management system maintained by the department under 85-2-112; and

(e) report to the legislature, not less than once every biennium.

(4) The environmental quality council shall provide staff assistance to the committee. The committee may contract with experts and consultants, in addition to receiving assistance from the environmental quality council, in carrying out its duties under this section.

Section 22. Section 85-2-122, MCA, is amended to read:

"85-2-122. Penalties. A person who violates or refuses or neglects to comply with ~~85-2-301,--85-2-402(1),--and 85-2-403(3)~~ the provisions of this chapter, any order of the department, or any rule of the board is guilty of a misdemeanor."

NEW SECTION. Section 23. Extension of authority. Any existing authority of the board and the department of natural resources and conservation to make rules on the subject of the provisions of this act is extended to the provisions of this act.

Section 24. Section 7, Chapter 706, Laws of 1983, is amended to read:

"Section 7. Termination date. ~~This--act~~ Section 4 of [this act] terminates July 1, 1985. The other sections do not terminate and are permanent law."

NEW SECTION. Section 25. Repealer. Section 85-2-104, MCA, is repealed.

NEW SECTION. Section 26. Codification instruction. Sections 14, 17, and 21 are intended to be codified as an integral part of Title 85, chapter 2, and the provisions of Title 85, chapter 2, apply to sections 14, 17, and 21.

NEW SECTION. Section 27. Severability. If a part of this act is invalid, all valid parts that are severable from the invalid part remain in effect. If a part of this act is

invalid in one or more of its applications, the part remains in effect in all valid applications that are severable from the invalid applications.

NEW SECTION. Section 28. Applicability. This act applies to all permit applications, change in appropriation right applications, water sales and lease applications, and reservation applications filed and pending with the department on July 1, 1985, but upon which a hearing under Title 85, chapter 2, has not yet commenced.

NEW SECTION. Section 29. Effective date. This act is effective July 1, 1985.

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